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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

DAVID TRIPPETT, Warden,
Petitioner,

vs.

CHARLES NORTHROP,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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99 pp

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

In *Holman v Page*, the 7th Circuit held that counsel's mere failure to pursue a Fourth Amendment claim can never satisfy the "prejudice" requirement of *Strickland v Washington*, since it enhances the reliability of the outcome. In this case, the state court rejected Respondent's claim of ineffective assistance on the merits, after a hearing at which it concluded that Respondent's Fourth Amendment claim would have failed on the merits.

A. Under *Williams v Taylor*, can a state court judgment be an unreasonable application of *Strickland*, when other Federal Circuits would reject the claim?

B. Does it violate this Court's holding in *Stone v Powell* to grant habeas relief on grounds of ineffective assistance of counsel relating to a Fourth Amendment claim which a state court has rejected on the merits?

II.

In *Strickland v Washington*, this Court noted that counsel is not ineffective for acting in accordance with information provided by the client. Here, the state court found that Respondent's representation to counsel that an

item seized was not his, and that he was cooperating with the police when they approached him, justified counsel in concluding that any Fourth Amendment challenge to the item seized, or to the act of approaching Respondent to investigate a report of drug trafficking, was meritless. Was the state court's resolution of Respondent's ineffective assistance claim an unreasonable application of this Court's holdings in *Strickland* and *Terry v Ohio*?

Table of Contents

Page

Index of Authorities . . . . . -ii-

Statement of Questions Presented for Review . . . . . -1-

Opinions Below . . . . . -4-

Statement of Jurisdiction . . . . . -4-

Constitutional Provisions Involved . . . . . -4-

Statement of the Case . . . . . -5-

Reasons for Granting the Writ . . . . . -11-

Relief . . . . . -28-

Appendix A
Court of Appeals Opinion, Order Judgment . . . . . -1a thru 31a-

Appendix B
District Court order and opinion Granting Habeas Corpus . . . . . -32b thru 59b-

Appendix C
District Court Judgment . . . . . -60c-

Appendix D
Michigan Supreme Court Order . . . . . -61d thru 63d-

INDEX OF AUTHORITIES

CASE PAGE

Arroyo v United States,
195 F3d 54 (CA 1, 1999) . . . . . -18-

Barnes v Thompson,
58 F3d 971, 979-980 (CA 4, 1995) . . . . . -25-

Brewer v Aiken,
935 F2d 850, 859 (CA 7, 1991) . . . . . -22-

Butler v McKellar,
494 US 407; 110 S Ct 1212;
108 L.Ed.2d 347 (1990) . . . . . -19-

Caspari v Bohlen,
510 US 383; 114 S Ct 948;
127 L Ed 2d 236 (1994) . . . . . -19-

Engle v Isaac,
456 US 107, 133-134; 102 S Ct 1558;
71 L Ed 2d 783 (1982) . . . . . -15,24-

Holman v Page,
95 F3d 481 (CA 7, 1996) . . . . . -16,17,18,21-

Hunt v Mitchell,
__ F3d ___ (CA 6 6#99-4308,
decided August 22, 2001) . . . . . -12-

Jones v Barnes,
463 US 745, 752; 103 S Ct 3308;
77 L Ed 2d 987 (1983) . . . . . -15-

CASE

Kimmelman v Morrison,
477 US 365, 382; 106 S Ct 2574;
91 L Ed 2d 305 (1986) . . . . . -14,15,16,19,20,-

Langford v Day,
110 F3d 1380, 1386-1387 (CA 9, 1996) . . . . . -25-

Lockhart v Fretwell,
506 US 364; 113 S Ct 838;
122 L Ed 2d 180 (1993) . . . . . -15,-

Mason v Mitchell,
257 F3d 554 (CA 6, 2001) . . . . . -12-

People v Ferguson,
376 Mich 90 (1965) . . . . . -23-

People v Heibel,
305 Mich 710, 712-713 (1943) . . . . . -23-

People v Northrop,
213 Mich App 494, 497-498 (1996) . . . . . -26-

Rakas v Illinois,
439 US 128; 99 S Ct 421;
58 L Ed 2d 387 (1978) . . . . . -27-

Rawlings v Kentucky,
448 US 98; 100 S Ct 2556;
65 L ed 2d 633 (1980) . . . . . -27-

Romero v Tansey,
46 F3d 1024, 1029-1030 (CA 10, 1995) . . . . . -25-

CASE

Scott v United States,
334 F2d 72, 73 (CA 6, 1964) . . . . . -15-

Simmons v Gramley,
915 F2d 1128, 1135 (CA 7, 1990) . . . . . -23,25-

Stone v Powell,
428 US 465; 96 S Ct 3037;
49 L Ed 2d 1067 (1976) . . . . . -14,20,19-

Strickland v Washington,
466 US 668;
104 S.Ct 2052;
80 L Ed 2d 674 (1984) . . . . . -13,14,15,16,18,21,24,25-

United States v Frazier,
936 F2d 262 (CA 6, 1991) . . . . . -24-

United States v Jones,
152 F3d 680, 683 (CA 7, 1998) . . . . . -18-

United States v Peters,
194 F3d 692 (CA 6, 1999) . . . . . -24-

United States v Tolbert,
692 F2d 1041 (CA 6, 1982) . . . . . -24-

United States v Williams,
106 F3d 1362, 1367 (CA 7, 1997) . . . . . -18-

Weeks v Jones,
26 F3d 1030, 1036-1037 (CA 11, 1994) . . . . . -25-

CASE

Williams v Taylor,
529 US 362 (2000) ..... -11,12-

Woods v Whitley,
933 F2d 321, 324 (CA 5, 1991) ..... -18-

STATUTE

28 USC §2254(d)(1) ..... -11,12,26-

28 USC §1254(1) ..... -4-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

DAVID TRIPPETT, Warden,
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vs.

CHARLES NORTHROP,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOW COMES the State of Michigan, by **MICHAEL E. DUGGAN**, *Prosecuting Attorney for the County of Wayne*, **TIMOTHY A. BAUGHMAN**, *Chief of Research, Training, and Appeals*, and **JEFFREY CAMINSKY**, *Principal Attorney, Appeals*, and prays that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals of the United States of America, entered in this cause on September 7, 2001, rehearing denied on November 1, 2001, and mandate issued on November 13, 2001.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is published at 213 Mich App 494; 541 NW2d 275 (1995). The order of the Michigan Supreme Court denying leave to appeal is reported at 453 Mich 950; 555 NW2d 260 (1996). The opinion of the District Court is reported at 60 F Supp 655 (ED Mich, 1999). The opinion of the Sixth Circuit affirming the District Court order granting the writ is reported at 257 F3d 554 (CA 6, 2001).

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion on September 7, 2001, denied rehearing on November 1, 2001, and issued its mandate on November 13, 2001 This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 29, 1990, uniformed Detroit Police Officers Robert Jackson and Oliver Collins responded to a radio run at the Greyhound Bus Station in the City of Detroit.[1] They had received information that two black males, one dressed in a green outfit, were suspected of selling narcotics in the bus station.[2] Arriving on the scene three or four minutes later, they approached a man in a green outfit, the only one at the station who matched the description, and noticed that Respondent was sitting next to him, and the two men were conversing..[3] Respondent had a duffel bag on his person at the time, which he placed under his seat.[4]

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[1]R 8, GH III, 4; T II, 6-7, Sixth Circuit Joint Apx 41a-42a, 399a.

[2]R 8, GH III, 4, Sixth Circuit Joint Apx 399a.

[3]R 8, GH III, 5-8, 48, Sixth Circuit Joint Apx 400a-403a, 443a.

[4]R 8, GH III, 35, Sixth Circuit Joint Apx 430a.

Respondent then rose from his seat, and was walking towards the officers; Jackson proceeded initially to speak to the man in green, while Collins spoke to Respondent at a distance "not too far" from the seat.[5] The distance separating them was about six feet.[6]

Collins asked Respondent, to empty his pockets,[7] and Jackson observed nothing illegal inside.[8] Collins then asked Respondent if he (Respondent) had any drugs on his person; Respondent admitted that he had some marijuana in his sock, and was placed under arrest.[9] Jackson testified that the two men were approximately three to five feet away at the time of arrest.[10] In addition, Jackson described Respondent as cooperative during the encounter.[11] Following his arrest, Officer Collins seized the duffel bag from under Respondent's seat; a search of the bag revealed a quantity of cocaine, leading to his subsequent trial and conviction.[12]

Following Respondent's arrest, attorney Eric Braverman undertook to represent him on the ensuing charge of possession of a controlled substance.[13] In his conversations with Respondent, it was apparent that the bag containing the

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[5]R 8, GH III 10-12, 15, Sixth Circuit Joint Apx 405a-407a, 410a.

[6]R 8, GH III. 16, Sixth Circuit Joint Apx 411a.

[7]R 8. GH III. 22, 52-53, Sixth Circuit Joint Apx 417a, 447a-448a.

[8]R 8. GH III 38. 52-53, Sixth Circuit Joint Apx 433a, 447a-448a.

[9]R 8, GH III 8-39, 52-53, Sixth Circuit Joint Apx 403a-434a, 447a-448a.

[10]R 8. GH III 36-37, Sixth Circuit Joint Apx 431a-432a.

[11]R 8, GH III 51, Sixth Circuit Joint Apx 446a.

[12]R 8, T II, 11-12, Sixth Circuit Joint Apx 46a-47a.

[13]R 8 , GH I, 7-8, Sixth Circuit Joint Apx 225a-226a.

cocaine was not seized from his client's person;[14] in fact, according to counsel, Respondent "couldn't give me a very good description of the bag, because it wasn't his bag" and he claimed that "he wasn't familiar with the bag."[15] At the time of the seizure, Braverman understood that Respondent was "about ten to 15 feet" away from the bag."[16] In addition, Respondent informed him that he had cooperated voluntarily with the police, prior to his arrest.[17]

As a matter of professional practice, Braverman ordinarily would not file a suppression motion that had no chance of success,[18] though he would do so if that was his client's only hope.[19] However, he would file any a motion which was a sure winner, or had some likelihood of success.[20]

Approaching Respondent's defense with the assumption that his client was telling him the truth,[21] Braverman realized that a defendant needed standing to challenge the seizure of property.[22] However, since his client had informed him that "it wasn't his bag,"[23] he realized that his client lacked the standing to raise a suppression motion,

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[14]R 8 . GH I. 75. Sixth Circuit Joint Apx 294a.

[15]R 8. GH I. 76. Sixth Circuit Joint Apx 294a.

[16]R 8. GH I. 81. 84. Sixth Circuit Joint Apx 302a, 304a.

[17]R 8. GH I. 90-93. Sixth Circuit Joint Apx 308a-311a.

[18]R 8. GH II. 32. Sixth Circuit Joint Apx 343a.

[19]R 8. GH II. 30. Sixth Circuit Joint Apx 341a.

[20]R 8. GH II. 32-33. Sixth Circuit Joint Apx 343a-344a.

[21]R 8. GH II. 28. Sixth Circuit Joint Apx 339a.

[22]R 8.GH I. 79. Sixth Circuit Joint Apx 297a.

[23]R 8. GH I. 79. Sixth Circuit Joint Apx 297a.

and therefore did not file a motion to suppress the contents of the bag.[24]

Prior to trial, he obtained discovery, and examined police reports in this matter.[25] He gave the trial his best effort, and tried the case well.[26]

At trial, Officer Collins testified that he placed Respondent under arrest when he admitted having marijuana in his sock, and that he confiscated the duffel bag which Respondent had been carrying prior to the arrest, and found that it contained cocaine.[27] However, being a "carry-on" item, the bag had no claim ticket to identify its owner.[28] On cross-examination, Braverman elicited a concession from Collins that there were many other people in the bus station,[29] that at one point during the investigation he and the man in green had moved "twenty or thirty feet" away from Respondent,[30] Collins also testified that he had also proceeded to investigate the man in green, while Jackson remained with Respondent,[31] and that Jackson subsequently seized the bag, together with Respondent, at the time of the arrest, and brought him to the place where he was investigating the man in green.[32]

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[24]R 8, GH I, 78-79, Sixth Circuit Joint Apx 296a-297a.

[25]R 8, GH I, 11-13, Sixth Circuit Joint Apx 229a-231a.

[26]R 8, GH V, 20, Sixth Circuit Joint Apx 520a.

[27]R 8, T II, 11-13, 37-38, Sixth Circuit Joint Apx 46a-48a, 72a-73a.

[28]R 8, T II, 32, Sixth Circuit Joint Apx 67a.

[29]R 8, T II, 15, 34-35, Sixth Circuit Joint Apx 50a, 69a-70a.

[30]R 8, T II, 27, Sixth Circuit Joint Apx 62a.

[31]R 8, T II, 18, Sixth Circuit Joint Apx 53a.

[32] R 8, T II, 28, Sixth Circuit Joint Apx 63a.

Braverman impeached this testimony with Collins' report, which indicated that it was himself, rather than Jackson, who took the bag into his possession.[33]

Braverman called three witnesses in defense: Kermit Morrell, who worked at the baggage counter at the bus station, testified that although both men checked baggage for their trip on the day in question, he did not observe either Respondent or his companion with any carry-on luggage.[34] In fact, Morrell testified that he did not see the duffel bag until he "saw it in the officer's hand,"[35] and testified that he neither saw, nor heard of anyone selling drugs in the lobby on the day in question.[36] After asking the officer where the bag had come from, Morrell was directed to leave the vicinity.[37]

Janice Johnson, Respondent's girlfriend, testified that she drove Respondent to the bus station on the day in question, and that he did not have any carry-on bags in his possession.[38]

And Bernice Northrop, Respondent's mother, testified that she had given Respondent the money found in his possession at the time of his arrest.[39]

At the conclusion of trial, the court found Respondent guilty,[40] and sentenced him to 8-to-20 years imprisonment.[41]

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[33]R 8, T II, 36-38, Sixth Circuit Joint Apx 71a-73a.

[34]R 8, T II, 40-43, Sixth Circuit Joint Apx 75a-77a.

[35]R 8, T II, 45, Sixth Circuit Joint Apx 80a.

[36]R 8, T II, 61, Sixth Circuit Joint Apx 96a.

[37]R 8, T II, 51, Sixth Circuit Joint Apx 86a.

[38]R 8, T II, 85-86, Sixth Circuit Joint Apx 120a-121a.

[39]R 8, T II, 99-101, Sixth Circuit Joint Apx 134a-136a.

[40]R 8, T III, 22, Sixth Circuit Joint Apx 190a.

[41]R 8, T IV, 28, Sixth Circuit Joint Apx 218a.

On appeal, Michigan courts affirmed his conviction and sentence.[42] Among the issues Respondent raised on appeal was a claim that counsel was ineffective for failing to file a motion to suppress evidence seized from the duffel bag.

On May 1, 1998, the Clerk's Office for the United States District Court rejected Respondent's initial habeas petition as defective; Respondent filed the instant habeas petition on May 7, 1998. Following Petitioner's answer on August 14, 1998, on November 16, 1999, the District Court granted the writ, concluding that the May 1st date was the effective filing date for purposes of the statute of limitations, and that the Michigan courts' conclusion that Respondent had received the effective assistance of counsel was outside the universe of plausible outcomes.[43]

On September 7, 2001, the Sixth Circuit affirmed the District Court in a published opinion. On November 1, 2001, the Sixth Circuit denied Petitioner's timely motion for rehearing, and issued its mandate on November 13, 2001.

Petitioner now seeks certiorari.

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[42]R 8, Court of Appeals Opinion, COA # 144218, Sixth Circuit Joint Apx 35a-37a; Michigan Supreme Court Order of November 15, 1998 denying leave, and Order of January 31, 1997 denying rehearing, Sixth Circuit Joint Apx 33a-34a.

[43]R 10, District Court Opinion, Apx 10ff.

REASONS FOR GRANTING THE WRIT

Present law limits habeas relief to obvious state court misapplications of "clearly established Federal law," as determined by this Court's precedents at the time the state court conviction became final.[44] In *Williams v Taylor*,[45] this Court recognized that Congress clearly intended to provide for a limited Federal role in reviewing state court convictions, and sought to limit the lower courts to granting habeas relief in only in cases where the state court's resolution of the federal constitutional claim at issue was —

- On a claim in which the outcome was dictated by existing precedent at the time of direct appeal; and

- Wrong, in light of clearly established, existing Supreme Court precedent; and

- So clearly wrong as to be "unreasonable" — mindful of the fact that "an *unreasonable* application of existing federal law is different from an *incorrect* application of federal law."[46]

Even so, as Justice O'Connor noted in her opinion for the Court in *Williams*, the term "unreasonable" is "difficult to define"[47] with abstract precision, and must be inferred from the state's application of the correct controlling legal principles to the facts of a given case. Thus, while applying the wrong legal

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[44] 28 USC §2254(d)(1).

[45] *Williams* v *Taylor*, 529 US 362 (2000).

[46] *Williams v Taylor, supra* at (146 L Ed 2d 428).

[47] *Williams v Taylor, supra* at 146 L Ed 2d 428.

standard would result in a decision which was "contrary to...clearly established federal law,"[48] a state court decision applying the correct legal standard would be an "unreasonable application of...clearly established federal law" only if it applied the correct governing principles unreasonably in the context of the facts.[49]

Unfortunately, as this and other cases demonstrate,[50] there remains much confusion concerning the proper scope of habeas review under the AEPDA — and the appropriate deference to be shown to the judgments of a state criminal court. And to avoid perpetuating the problem — and, perhaps, to avoid having larger problems to resolve in the near future, as confusion escalates and Circuits come to resolve new legal questions on habeas once again — this case presents a new opportunity to bring order out of the growing disarray.

A. The Sixth Circuit erred in overturning the state court judgment in this case as an unreasonable application of this court's holding in *Strickland v Washington*, when other federal jurisdiction would preclude relief due to the inherent nature of a Fourth Amendment claim.

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[48] 28 USC §2254(d)(1). *See, Williams v Taylor, supra* at 146 L Ed 2d 425-426, 430.

[49] 28 USC §2254(d)(1). *See, Williams v Taylor, supra* at 146 L Ed 2d 425-430.

[50] Petitioner notes a similar misunderstanding of both the applicable precedents, and the scope of habeas review under the AEDPA. occurring in the Sixth Circuit cases of *Mason v Mitchell*, 257 F3d 554 (CA 6, 2001) and *Hunt* v *Mitchell*, ___ F3d ___ (CA 6 6#99-4308, decided August 22, 2001).

Under this Court's holding in *Strickland v Washington*,[51] in order to establish a denial of his Sixth Amendment right to the effective assistance of counsel, a defendant must establish not only the incompetence of his attorney, but also the fact that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[52] It appears to follow, as a matter of elemental logic, that any error of counsel which serves to *enhance* the reliability of the outcome cannot form the basis for a claim of ineffective assistance, since the function of counsel is not to ensure a favorable outcome, but to "render the trial a reliable adversarial testing process."[53] Moreover, concentrating on the details of counsel's performance, rather than the overall fairness of the process, is an approach at odds with the fundamental purpose of the Sixth Amendment. As the *Strickland* Court noted:

> "[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendant's receive a fair trial."[54]

Thus, it is logical to conclude that counsel's mere failure to file a Fourth Amendment suppression motion would not ordinarily give rise to a finding of ineffective assistance under *Strickland*, for the same reason that Fourth Amendment

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[51] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[52] *Strickland* at 687.

[53] *Strickland*, at 688.

[54] *Strickland*, at 689.

claims are generally unavailable on habeas review: as it is the availability of the exclusionary sanction, rather than its unthinking imposition, that gives the sanction whatever value it has in deterring police misconduct, there is no purpose to be serve by applying it in circumstances where it is not a factor. And the deterrent rationale of the Fourth Amendment exclusionary rule can hardly apply to Sixth Amendment concerns — since the exclusionary rule seeks to advance core Fourth Amendment values by removing the incentive for police to violate its protections, while the Sixth Amendment merely seeks to ensure all defendants a fair trial. But while evidence subject to suppression is excluded for reasons unrelated to its reliability, the introduction of reliable evidence actually makes the outcome more reliable; thus, while a meritorious Fourth Amendment claim may show that counsel may have overlooked something, a Fourth Amendment claim alone provides no basis for relief on habeas.[55] Rather, a habeas petitioner must satisfy the "rigorous standard which *Strickland* erected,"[56] in order to win relief. As this Court noted in *Kimmelman v Morrison*:

> "...*Strickland*'s standard, although by no means insurmountable, is highly demanding. More importantly, it differs significantly from the elements of proof applicable to a straightforward Fourth Amendment claim. Although a meritorious Fourth Amendment claim is necessary to the success of a Sixth Amendment claim like respondent's a good Fourth Amendment claim alone will not earn a prisoner habeas relief.

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[55] *Kimmelman v Morrison*, 477 US 365, 382; 106 S Ct 2574; 91 L Ed 2d 305 (1986); *see also*, *Stone v Powell*, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976).

[56] *Kimmelman*, at 381.

> Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ...."[57]

Thus, counsel's mere failure to advance a claim that may have succeeded is insufficient to establish ineffectiveness.[58] It is, after all, not perfection, but reasonable professionalism that is the standard, for the Sixth Amendment guarantees only a fair trial and competent counsel — not the ideal outcome,[59] nor a counsel duty-bound to recognize and raise every conceivable constitutional claim.[60] And given the deterrent rationale of the Fourth Amendment, such considerations suggest that the mere failure to seek suppression of otherwise probative evidence

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[57]*Kimmelman*, at 382.

[58]*Cf, Lockhart v Fretwell*, 506 US 364; 113 S Ct 838; 122 L Ed 2d 180 (1993).

[59]*Lockhart v Fretwell, supra; see also, Scott v United States*, 334 F2d 72, 73 (CA 6, 1964).

[60]*Engle v Isaac*, 456 US 107, 133-134; 102 S Ct 1558; 71 L Ed 2d 783 (1982). Courts recognize that such a hide-bound approach is often counterproductive on appeal. *See, eg, Jones v Barnes*, 463 US 745, 752; 103 S Ct 3308; 77 L Ed 2d 987 (1983). It is, after all, a function of counsel's experience and effectiveness to try to narrow the focus of litigation, to assist the court — not to use a legal shotgun, hoping to hit something, but running the risk of simply losing the judge's attention along the way. And it would be an odd rule of law that granted appellate courts the benefit of counsel's focus and attention when considering precise questions of law, while denying it from the trial court or factfinder, who would otherwise be confronted with a wild and perplexing array of minutiae.

As counsel testified at the *Ginther*-hearing, when he had a strong case he would generally try to focus the court's attention — saving the "scattershot" approach for cases where he was scrambling for a legal leg to stand on. (R 8, GH II, 37-38,Sixth Circuit Joint Apx 348a-349a).

under the Fourth Amendment[61] will not, without more, suffice to establish a claim of ineffectiveness under the Sixth Amendment.

Other Circuits have already adopted this approach: In *Holman v Page*,[62] for example, the Seventh Circuit noted the critical differences between the Fourth and Sixth Amendments, concluding that a mere difference in result under the Fourth Amendment was insufficient to establish "prejudice" under *Strickland*:

> "It is inconsistent with the function of the [Fourth Amendment] exclusionary rule to permit a criminal defendant on federal habeas review to claim prejudice because but for his counsel's incompetence on the suppression issue he would have gotten away with the crime. Such a claim may be factually true — but that alone does not entitle a convict to a new trial because that alone does not constitute 'prejudice' within the meaning of *Strickland*.

Drawing the lessons of *Kimmelman*, *Strickland*, and *Lockhart v Fretwell* to include consideration of the adversarial crucible, rather than viewing various claims of error in isolation, the *Holman* Court noted that, under *Strickland*, "prejudice" related to the fairness of the proceedings and confidence in the outcome — not whether the defendant received the most favorable outcome possible under the circumstances. *Holman*, at 491. Thus, while acknowledging that counsel's ineffectiveness in asserting a Fourth Amendment claim might lend support to an overall assessment

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[61]The same logic suggests a different approach under the Fifth Amendment — where a claim that a confession is involuntary is, in essence, a claim that it is inherently unreliable.

[62]*Holman v Page*, 95 F3d 481 (CA 7, 1996).

of incompetence, *Holman*, at 492, the Court flatly rejected the notion that a mere potential difference in the outcome of a Fourth Amendment claim could suffice to establish a claim of ineffective assistance of counsel, relying upon several aspects of black-letter law to justify its conclusion:[63]

- It is not unfair to a defendant for a jury to consider reliable but improperly gathered evidence.

- Fairness to the accused has nothing to do with the underlying purpose of the exclusionary rule, which is why Fourth Amendment claims are unavailable to a habeas petitioner.

- The purpose of the exclusionary rule is to deter misconduct by the police and law enforcement officers — not to grant windfalls to guilty defendants.

- And failing to apply the exclusionary rule does not "prejudicially impact the correctness of the verdict," but instead "it enhances the truthfinding process by permitting the consideration of valuable probative evidence.

Therefore, under the Seventh Circuit's approach, the mere fact of counsel's ineffectiveness in dealing with a Fourth Amendment claim will be insufficient to warrant habeas relief, since the petitioner will have suffered no "prejudice," within

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[63]*See, Holman v Page, supra* at 491.

the meaning of *Strickland*.[64] This approach has two applications to the instant case — a direct one, and an indirect one.

Directly applying the Seventh Circuit rationale to this case, it is clear that Petitioner cannot sustain his burden on habeas: Petitioner has raised only the Fourth Amendment challenge to counsel's performance and, as the trial judge noted, counsel "gave his best efforts at the trial" and "it was a well tried case."[65] Therefore, given his performance in the cauldron of trial, any imperfections in his handling of any Fourth Amendment claim could not satisfy the *Strickland* standard of prejudice, since the introduction of the contested evidence "enhance[d] the truthfinding process by permitting the consideration of valuable probative evidence."[66] And it follows that, under the Seventh Circuit's analysis, the District Court erred in granting the writ.

However, the Seventh Circuit approach precludes habeas relief in this case, even if this Court declines to follow it — for, since the Seventh Circuit would reject Petitioner's habeas claim for lack of legal merit, the fact that Michigan reached the same result by different reasoning means that the outcome is not "outside the universe of plausible, credible

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[64]*Holman*, at 491-492. *See also, United States v Williams*, 106 F3d 1362, 1367 (CA 7, 1997); *United States v Jones*, 152 F3d 680, 688 (CA 7, 1998). *Cf. Woods v Whitley*, 933 F2d 321, 324 (CA 5, 1991)(Noting that erroneous receipt of illegally seized evidence does not constitute "prejudice" so as to excuse omission of issue from earlier habeas petition); *Arroyo v United States*, 195 F3d 54 (CA 1, 1999)(Noting 7th Circuit approach, but finding it inapplicable on the facts).

[65]R 8, GH V, 20, Sixth Circuit Joint Sixth Circuit Joint Apx 520a.

[66]*Holman*, at 491.

outcomes," thereby precluding relief on federal habeas.[67] Accordingly, the District Court erred in granting the writ, the Sixth Circuit erred in affirming, and this Court must inevitably intervene to correct the reasoning and approach of the lower courts — either now, to prevent the schism from growing, or later, to resolve the conflict.

B. It violates this Court's holding in *Stone v Powell* to grant habeas relief on grounds of ineffective assistance of counsel relating to a Fourth Amendment claim which a state court has rejected on the merits.

In *Stone v Powell*,[68] this Court held that a state prisoner cannot raise a Fourth Amendment claim in a federal habeas petition. In *Kimmelman v Morrison*, this Court held that while a meritorious Fourth Amendment claim may be a *necessary predicate* for finding of ineffective assistance in a Fourth Amendment context, it was not sufficient to establish the Sixth Amendment claim by itself. In this case, the Court confronts the tension between the two cases — in a manner outlined by Justice Powell's concurring opinion in *Kimmelman*.

In this case, Sixth Circuit affirmed the District Court's grant of relief on Sixth Amendment grounds — for failing to raise a Fourth Amendment claim that the state court rejected during the course of the evidentiary hearing inquiring into the effective assistance of counsel.

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[67]*See, eg, Butler v McKellar*, 494 US 407; 110 S Ct 1212; 108 L.Ed.2d 347 (1990); *Caspari v Bohlen*, 510 US 383; 114 S Ct 948; 127 L Ed 2d 236 (1994)(Both holding that disagreement among circuits and states considering question shows that issue was susceptible to debate among reasonable jurists).

[68]*Stone v Powell*, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976).

This state of affairs strikes Petitioner as a logical *non sequitur*, effectively placing a criminal defendant in a more favorable position for *failing* to raise a Fourth Amendment claim properly than he would be if he raised the manner in an appropriate and timely manner: simply put, under the Sixth Circuit's approach, a defendant who raises a Fourth Amendment claim in a timely manner during the course of litigating the question of guilt or innocence is barred from raising the point on Federal habeas review.[69] However, a defendant who fails or omits to raise the point prior to trial will have at least two chances to convince a court of the merits of the Fourth Amendment claim — first by raising a collateral attack in state court, challenging counsel's omission to raise the point prior to trial; and if then on habeas review, where the Federal courts will be free to reconsider both the question of counsel's effectiveness, and the merits of the Fourth Amendment claim.

Clearly, this approach is inconsistent with both the existing precedents of this Court, and the limited scope of review under the AEDPA: under *Kimmelman* and *Stone v Powell*, it seems to Petitioner, a meritorious Fourth Amendment claim may be a *necessary — but not a sufficient* — basis for a finding of ineffective assistance of counsel. And when combined with a plausible basis for omitting the claim — in this case, Respondent's representations to counsel that he was cooperating with the police, *and that the item seized was not his in the first place* — it seems a logical consequence of *Stone* and *Kimmelman* that review of litigated Fourth Amendment claims is simply *barred* on habeas review, whether the point was considered during the normal course of a criminal prosecution, or during a collateral inquiry into the effectiveness of counsel. To do otherwise invites defendants with questionable claims to manipulate the system to guarantee themselves the most favorable forum, rather than encouraging them to follow the established rules of criminal procedure.

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[69] *Stone v Powell, supra.*

And since this kind of manipulation is likely to follow in the wake of the Sixth Circuit's ruling, this Court should intervene to correct the problem before it gets out of hand.

Therefore, even if this Court is disinclined to adopt the approach of the Seventh Circuit with regard to whether a Fourth Amendment claim will typically support a claim of ineffective assistance,[70] it should grant certiorari to consider whether the Federal bench should continue reexamining Fourth Amendment claims, merely because the vehicle the habeas petitioner chose to raise the point in state court was a claim of ineffective assistance of counsel, rather than a direct claim of unreasonable search and seizure.

C. A state court judgment that counsel was not ineffective for failing to raise a Fourth Amendment claim to an object the defendant told counsel was not his is not an unreasonable application of existing Federal law.

Current law anticipates a high level of communication and trust between a defendant and his attorney — and, in fact, recognizes that what a defendant tells his lawyer will often determine the future course of the attorney's actions, and the ultimate contours of the defense — as this Court itself noted in *Strickland v Washington*:[71]

> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite

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[70] *See, Holman v Page, supra* and the argument section immediately preceeding this one.

[71] *Strickland, supra* at 691 (*emphasis added*).

> properly, on informed strategic choices made by the defendant and on information supplied by the defendant....And *when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable*."

In addition, the law recognizes ethical considerations often constrict an attorney's options, precluding counsel from offering perjured testimony, or fraudulent evidence. Thus, in *Brewer v Aiken*,[72] the Seventh Circuit dismissed as "anomolous and absurd" the government's argument that defense attorneys adhere to their ethical duties to the court through "the defense attorney's presentation of perjured testimony ....".[73] And case law rejects the notion that a defendant can win habeas relief by placing counsel on the horns of an ethical dilemma — and forcing counsel to present both sides of a mutually exclusive version of the truth, depending upon which side happens to be more convenient at

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[72]*Brewer v Aiken*, 935 F2d 850, 859 (CA 7, 1991).

[73]However, the *Brewer* Court found no reason to grant relief on this basis — noting the petitioner's procedural default on this ground, and the ample evidence of counsel's failure to investigate any factors mitigating against the death penalty in his client's case. In fact, the court noted that the underlying purpose of the ethical obligation of defense counsel to refrain from presenting false evidence is to protect the court — not the defendant. This led the Court to decline to give defendants, or their attorneys, a tactical advantage by removing the practical constraints against perjury for the defense, and "creat[ing] a rule allowing a defendant to go free if perjured testimony succeeds while at the same time providing for a new trial if the witness is a poor liar." *Brewer*, at 860.

In Michigan, an attorney's ethical obligation to refrain from presenting false evidence or perjured testimony stems from MCPR 3.4. To date, counsel for Respondent is unaware of any decision by any court holding any attorney constitutionally ineffective for declining to present false evidence.

the moment: Thus, because the information received from his client will often determine the reasonableness of counsel's subsequent actions, a defendant who claims one version of the truth "cannot...fault his attorney's decision not to pursue a different...defense."[74]

In this case, counsel testified that during their various consultations, Petitioner informed him that the bag in which police found the cocaine was not his, and consequently Petitioner could not give counsel a good description of the item "because he wasn't familiar with the bag."[75] Thus, at the point at which counsel would have been contemplating a suppression motion,[76] he had no facts which would justify the

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[74] *Simmons v Gramley*, 915 F2d 1128, 1135 (CA 7, 1990).

[75] R 8 , GH, I, 76-80; *see also* GH II, 26-30, Sixth Circuit Joint Sixth Circuit Joint Apx 294a-298a, 337a-341a. Defense counsel also testified that he would initially operate under the assumption that his client was "telling me the truth" and "assume that his version of the facts are the correct version of the facts." (R 8, GH II, 27-28, Sixth Circuit Joint Apx 338a-339a). Here, in addition to telling his attorney that he knew nothing about the bag in question, Petitioner had informed him that he had been "cooperative" with the police.

[76] The District Court's passing observation that "[i]n Michigan, a motion to suppress may be filed before or even during trial," is simply incorrect: The case the court cited, *People v Ferguson*, 376 Mich 90 (1965), stands for the proposition that a motion to suppress evidence must be filed, if at all, prior to trial — though it grants courts the discretion to entertain suppression motions during trial, if unexpected events intervene. Otherwise, state law regards the legality of a search as a "collateral matter" which does not justify turning aside from the trial. See, eg, *People v Heibel*, 305 Mich 710, 712-713 (1943).

Here, the trial court observed that in his experience, a mid-trial suppression motion had arisen in his courtroom only upon stipulation of the parties — ie, when they had advised him prior to trial that, in order to expedite the proceedings, he would be hearing a suppression motion during the course of the trial. (R 8, GH I, 55-56, Sixth Circuit Joint Apx 273a-274a), and the parties discussed this very aspect of the case during the course of the proceedings. (*See*, R 8, GH I, 55-58, Sixth Circuit Joint Apx 273a-276a).

suppression of evidence — since his client's disclaimer of any knowledge of the seized bag meant that he had no way to establish the threshold of Petitioner's "standing" to contest its seizure.[77] And, since it was Petitioner's own representations to counsel that circumscribed his options, he cannot fault counsel for pursuing a different avenue of defense.[78]

In any case, and however the District Court might have resolved the merits of the underlying Fourth Amendment claim,[79] it is hardly an unreasonable application of *Strickland* to conclude that Petitioner's own disclaimer of interest in the bag gave his attorney "reason to believe that pursuing certain investigations would be fruitless," and that for purposes of a post-conviction inquiry into counsel's performance, "counsel's failure to pursue those investigations may not...be challenged

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[77]*See, eg, United States v Tolbert*, 692 F2d 1041 (CA 6, 1982); *United States v Frazier*, 936 F2d 262 (CA 6, 1991); *United States v Peters*, 194 F3d 692 (CA 6, 1999). In addition, as shown *infra*, there were other weaknesses that would have militated against filing a suppression motion — except, perhaps, as an act of desperation. These include the doctrine of search incident to arrest, and inventory search. Even here, however, counsel testified that he would have filed the motion if he felt that it was his client's only hope — even if he felt that it presented a weak case for suppression. (R 8, GH II, 29-33, Sixth Circuit Joint Apx 247a-251a).

[78]*Strickland v Washington, supra* at 691; *Engle v Isaac, supra* at 133-134.

[79]As shown *infra*, the District Court's analysis of the controlling Fourth Amendment principles appears to stem from a misreading of the record.

In addition, the District Court ascribed to defense counsel a misperception of the law concerning the contours of the "standing" doctrine that he did not have. (R 8, GH II, 71-74, Sixth Circuit Joint Apx 382a-385a). Curiously, however, the District Court did not distinguish between a "propriety interest," and a "legitimate expectation of privacy" — nor explain how, under the circumstances of this case, the Petitioner could have a "legitimate expectation of privacy" in an object that he insisted "was not his." (R 10, District Court Opinion, p 16, Sixth Circuit Joint Apx 25a).

as unreasonable."[80] After all, Circuits across the country have dismissed similar claims, under a wide variety of circumstances, where a defendant seeks to overturn his conviction on grounds that his attorney was foolish enough to believe what he said: In *Weeks v Jones*,[81] for example, the Eleventh Circuit dismissed the petitioner's claim of ineffective assistance based upon counsel's failure to investigate and pursue an insanity defense, where the petitioner informed counsel that he was innocent of the charge, and denied any previous history of mental health problems. In *Langford v Day*,[82] the Ninth Circuit rejected the petitioner's claim of ineffective assistance for failing to seek to suppress his confession, where counsels' file contained no indication that he had initial declined to make a statement, and the petitioner informed counsel that he had made a voluntary statement with full knowledge of his constitutional rights. In *Romero v Tansey*,[83] the Tenth Circuit looked to the petitioner's statement to counsel that the victim "could not identify him because he was wearing a hat and sunglasses" at the time, in concluding that counsel could have reasonably concluded that his client was present at the scene of the crime, and was not constitutionally ineffective failing to investigate or pursue an alibi defense. And in *Barnes v Thompson*,[84] the Fourth Circuit put it even more bluntly, noting testily that "counsel may rely on the truthfulness of his client and those whom he interviews in deciding how to pursue his investigation." Such widespread reluctance to find counsel ineffective for accepting his client's word at face value suggests that Michigan's resolution of the

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[80]*Strickland*, at 691. *Cf. Simmons v Gramley, supra.*

[81]*Weeks v Jones*, 26 F3d 1030, 1036-1037 (CA 11, 1994).

[82]*Langford v Day*, 110 F3d 1380, 1386-1387 (CA 9, 1996).

[83]*Romero v Tansey*, 46 F3d 1024, 1029-1030 (CA 10, 1995).

[84]*Barnes v Thompson*, 58 F3d 971, 979-980 (CA 4, 1995).

point was not so unreasonable as to be "outside the universe of plausible, credible outcomes,"[85] and that the lower court's dismissal of counsel's acceptance of his client's word at face value appears to be contrary to existing law. Accordingly, the District Court erred in granting the writ this basis, 28 USC §2254(d)(1), and this Court should reverse on this basis as well.

D. The lower courts erred in overturning Respondent's state court conviction in the absence of his standing to contest the seizure of the item in which the police found the drugs which led to his prosecution.

While this Court may have more important concerns that correcting routine errors of law by the lower courts, the lower courts' major error of elementary Fourth Amendment law suggests that this case would be an appropriate vehicle to address the more important concerns raised above.

In this case, the defense raised was that the bag containing the contraband was not Respondent's: defense counsel argued this point at trial,[86] and at the post-conviction inquiry into counsel's effectiveness testified that Respondent had told him that the bag was not his, and that he was not familiar with it at all.[87] Since Respondent did not testify at the post-conviction hearing, however, he has failed to establish his standing to challenge the seizure of evidence in the first place, and the lower Federal courts have erred in granting relief in the

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[85]*Nevers v Killinger, supra* at 362.

[86]*See, People v Northrop,* 213 Mich App 494, 497-498 (1996).

[87]R 8, GH I, 76, Sixth Circuit Joint Apx 294a.

absence of a showing of standing to raise the claim.[88] Moreover, in light of the fact that this Court has clearly held that the subjective intentions of the individual police officers do not end a court's Fourth Amendment inquiry — and that it is the effect of police conduct on the citizen, rather than what is in the officer's mind at the time of any encounter — it appears that the lower courts erred in addressing the merits of the Fourth Amendment claim, as well.

Accordingly, given the lower court's error in resolving the Fourth Amendment claim on the merits, it seems to Petitioner that this is an appropriate case for the Court's intervention.

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[88]*Rakas v Illinois*, 439 US 128; 99 S Ct 421; 58 L Ed 2d 387 (1978); *Rawlings v Kentucky*, 448 US 98; 100 S Ct 2556; 65 L ed 2d 633 (1980).

RELIEF

WHEREFORE, this Court should grant certiorari in this matter.

MICHAEL E. DUGGAN
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, & Appeals

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Dated: January 3, 2002

JC/lw

J:\PROSCUTR\APPEALS\JCAMINSK\USSC\northrop,charles,ussc,cert.wpd

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES NORTHROP,
Petitioner-Appellee,

No. 99-2472

v.

DAVID TRIPPETT, Warden,
Respondent-Appellant.

Appeal from the United States District Court
for the Eastern District of Michigan at Bay City.
No. 98-10133 - Victoria A. Roberts, District Judge.

Argued: April 25, 2001

Decided and Filed: September 7, 2001

Before: BOGGS and CLAY, Circuit Judges; *GWIN, District Judge.

COUNSEL

ARGUED: Jeffrey W. Caminsky, COUNTY OF WAYNE PROSECUTOR'S OFFICE, Detroit, Michigan, for Appellant. David A. Moran, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee.

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*The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

ON BRIEF: Jeffrey W. Caminsky, COUNTY OF WAYNE PROSECUTOR'S OFFICE, Detroit, Michigan, for Appellant.

COURT OF APPEALS OPINION

Ronald E. Steinberg, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee.

GWIN, D.J., delivered the opinion of the court, in which CLAY, J., joined. BOGGS, J. (pp. 21-27), delivered a separate dissenting opinion.

OPINION

GWIN, District Judge. In this case, Respondent-Warden David Trippett appeals the district court's grand of a writ of habeas corpus to Petitioner Charles Northrop pursuant to 28 U.S.C § 2254. In granting Northrop's petition, the district court found Northrop had been denied his Sixth Amendment right to the effective assistance of counsel. Although for different reasons than those relied upon by the district court, we agree that Northrop did not receive effective assistance of counsel sand thus **AFFIRM** the judgement of the district court.[1]

I

Petitioner Northrop seeks relief from his state conviction for possession of cocaine. He says his conviction cannot stand because he did not receive the effective representation due him under the Sixth Amendment.[2] In particular, Northrop says his

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[1]At oral argument, counsel informed us thtr Petitioner Northrop is no longer in prison. Because Northrop filed this petition while in prison, his recent release does not defeat our habeas jurisdiction. *Carafas v. Lavalee*, 391 U.S. 234, 239-40, 88 S. Ct. 1556, 20 L. Ed 554 (1968).

[2]In his habeas petition, Northrop also asserts a double jeopardy claim under the Fifth Amendment. He does not appeal the district court's rejection of this claim.

trial counsel should have moved to suppress the cocaine evidence offered against him at trial.

On August 29, 1990, an anonymous caller informed the Detroit Police Department that two black males one wearing a green "Used" jeans outfit, were selling drugs at the Greyhound Bus Station in Detroit. The caller provided no other information.

That same day, Detroit Police Officers Robert Jackson and Oliver Collins received a radio call relaying the anonymous tip. Minutes later, the uninformed officers arrived at the bus station, where they observed two black males sitting and talking. One of the males wore an outfit matching the description included in the tip. The other male was Charles Northrop.

As the officers approached, Northrop took a duffel bag off his shoulder and placed it under his seat. He then rose from his seat and attempted to walk past the officers. Before he could do so, Collins stopped Northrop.

Collins and Jackson both asked Northrop for identification. Collins next asked Northrop to empty his pockets. Northrop complied. After finding no contraband in Northrop's pockets, Collins asked Northrop if he had any drugs on his person. In response, Northrop admitted that he had marijuana in his sock. Collins then arrested Northrop for violating a municipal marijuana ordinance.

After arresting Northrop, Collins seized the duffel bag that Northrop had placed under his seat just moments before. A search of the gag revealed a large quantity of cocaine.

Michigan charged Northrop with possession of a controlled substance. On November 29, 1990, after a bench trial in the

Wayne County Circuit Court, Northrop was convicted of possessing between 50 and 225 grams of cocaine. The trial court sentenced Northrop to eight to twenty years in prison. Attorney Eric Braverman represented Northrop through the trial.

Northrop appealed his conviction, raising the Sixth Amendment claim he now advances in support of his habeas petition. The Michigan Court of Appeals rejected the claim. The Michigan Supreme Court denied Northrop's leave for second appeal.

After unsuccessfully appealing his conviction, Northrop filed a petition for a writ of habeas corpus with the united States District Court for the Eastern District of Michigan. On November 16, 1998, the district court granted the writ.

Respondent-Warden David Trippett now appeals the district court's ruling.

II

We review the district court's decision to grant or deny a writ of habeas corpus de novo. *Baker v. Yukins*, 199 F.3d 867, 870 (6th Cir. 1999). In so doing, we consider the substantive standards governing the review of state court decisions challenged in a federal habeas petition. *Id.* at 871.

Because Northrop filed his petition after 1994, the Antiterrorism and Effective Death Penalty Act ("AEDPA") sets the standard for federal habeas review under 28 U.S.C. § 2254. The AEDPA amended the standard of review set forth in 28 U.S.C. § 2254(d) to provide:

> An application for writ for habeas corpus on behalf of a person in custody pursuant to the judgement of the state court shall not be granted with respect to any claim that

> was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonably application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The United States Supreme Court recently interpreted this statute, specifically addressing the distinction between decisions "contrary to" and involving an "unreasonable application" of clearly established federal law. *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The Court explained that a state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Id.* at 412-13.

In contrast, a state court decision involves an unreasonable application of clearly established federal law only where the state court's application of such law was "objectively unreasonable." *Id.* at 409. A federal habeas court may not find a state adjudication unreasonable "simply because that court concludes in its independent judgement that the relevant decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. "Rather, that application must also be unreasonable." *Id.*

The district court below reviewed Northrop's habeas petition upon the record developed at the state court. The district court conducted no evidentiary hearing. When a district court decides a habeas petition without evidentiary hearing, we review that district court's factual findings *de novo*. *Wolf v.*

Brigano, 232 F.3d 499, 501 (6th Cir. 2000) ("Any findings of fact made by the district court are normally reviewed only for clear error, but when the district court's decision in a habeas case is based on a transcript form the petitioner's state court trial, and the district court thus makes no credibility determination or other apparent finding of fact,' the district court's factual finding are reviewed *de novo*")(citations omitted.); *Moore v. Carlton*, 74 F.3d 689, 691 (6th Cir. 1996) ("The district court made no credibility determination or other apparent finding of fact; its decision was based upon the transcript of Moore's trial. As such, it is reviewed *de novo*"). We therefore review the district court's factual findings *de novo*.

III.

In his petition, Northrop says his trial counsel, Eric Braverman, made errors so serious that he ceased to function as the counsel guaranteed under the Sixth Amendment.[3] U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assignment of Counsel for his defence."). He insists Braverman incompetently failed to move the suppression of the cocaine evidence used against him at trial. According to Northrop, the police discovered this cocaine during an unlawful seizure and search.

The Fourth Amendment prohibits "unreasonable searches and seizures."[4] U.S. Const. Amend. IV. Evidence recovered from an illegal search is inadmissible. *Weeks v. United States*, 232 U.S. 383, 398, 34 S. Ct. 341, 346, 58 L. Ed. 652 (1914).

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[3]The Sixth Amendment applies to the States through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 355, 342-45, 83 S. Ct. 792, 9 L. Ed 2d 799 (1963).

[4]Like the Sixth Amendment, the Fourth Amendment applies to the States through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

Further, evidence recovered indirectly from an illegal search or seizure is also inadmissible as "fruit of the poisonous tree." *Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984); *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392-93; 40 S. Ct. 182, 64 L. Ed. 319 (1920).

But a defendant must seek the exclusion of such evidence at trial or on direct appeal. Because questions regarding the admissibility of otherwise relevant we evidence seldom touch upon the "basic justice" of a conviction, the Supreme Court bars Fourth Amendment claims from habeas review, *Kuhlmann v. Wilson*, 477 U.S. 436, 447, 106 S.. Ct. 2616. 91 L. Ed. 2d 364 (1986); *Stone v. Powell*, 428 U.S. 465, 494-95, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976).

However, a habeas petitioner may assert a Sixth Amendment claim based on his counsel's failure to move for the suppression of evidence that should be excluded under the Fourth Amendment. *Kimmelman v. Morrison*, U.S. 365, 382-83, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). To establish a Sixth Amendment claim, the petitioner must show his counsel performed deficiently and that the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Here, Northrop says Braverman's performance was both deficient and prejudicial. Northrop argues that Braverman performed deficiently by not seeking suppression of the cocaine evidence. He says the Fourth Amendment provided two grounds for excluding the cocaine. First, Northrop says the officers illegally searched the duffel bag,, thus rendering the cocaine they discovered in the bag inadmissible. Second, Northrop contends that the officers illegally seized him in the bus station. Had the officers not done so, Northrop submits

they never would have discovered the cocaine in the duffel bag. The cocaine, according the Northrop, was thus inadmissible as fruit of the illegal seizure.

And Northrop insists Braverman's deficient performance resulted in prejudice. If Braverman had moved for suppression, Northrop says the trial court would have excluded the cocaine evidence and acquitted him of cocaine possession.

Northrop raised this Sixth Amendment claim on direct appeal. In denying the claim, the Michigan Court of Appeals found the Braverman made an acceptable strategic decision in choosing not to seek suppression of the cocaine evidence:

> This Court is convinced that defendant was not denied his constitutional right to effective assistance of counsel as it is apparent form the proceedings that defense counsel considered motions to suppress evidence, but was convinced, after his conversations with defendant and other investigation, that such motions would not be granted, and that the most effective trial tactic was to make the defense that the luggage was not that of the defendant.

In granting Northrop's petition, the district court held that this ruling fell "outside the universe of plausible, credible outcomes." The district court found no reasonable basis for excusing Braverman's failure to move for suppression of the cocaine evidence. According to the district court, the cocaine was subject to suppression because the officers discovered it while performing an invalid search incident to arrest.

We disagree. Although, as explained below, we affirm the district court's grant of habeas relief on other grounds, we find the district court erred in ruling the officers' search unconstitutional.

Under the Fourth Amendment, a search absent a warrant is per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

When conducting a search incident to arrest, police may search items within the "immediate control" of the person arrested. *Id.* at 763. The Supreme Court has construed the area within a person's immediate control to include the "area from within which he might gain possession of a weapon or destructible evidence." *Id.*

However, the right to search an item incident to arrest exists even if that item is no longer accessible to the defendant at the time of the search. So long as the defendant had the item within his immediate control near the time of his arrest, the item remains subject to a search incident to arrest. *New York v. Belton*, 453 U.S. 454, 461-62 n.5, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (upholding search of jacket located in vehicle where defendant sat just prior to his arrest); *United States v. Nelson*, 102 F.3d 1344, 1347 (4th Cir. 1996) (upholding search of the defendant's shoulder bag after agents had removed it from him and taken him to another room for questioning); *United States v. Mitchell*, 64 F.3d 1105, 1110-11 (7th Cir. 1995) (upholding search of item after defendant was handcuffed).

Here, Northrop had the duffel bag on his shoulder as Jackson and Collins approached. Observing them coming toward him, Northrop removed the bag from his shoulder and placed it at his feet. Collins stopped Northrop near the bag. Collins then placed Northrop under arrest at this same location. The bag was searched almost immediately.

Under these circumstances, Jackson sand Collins lawfully searched the duffel bag incident to Northrop's arrest. Thus, the Michigan Court of Appeals properly found that Braverman did not perform ineffectively in failing to challenge the search.

But we nevertheless find that the Michigan Court of Appeals unreasonably applied clearly established federal law in denying Northrop's Sixth Amendment claim.[5] Jackson and Collins lacked sufficient basis for stopping Northrop. Braverman should thus have sought to suppress the cocaine evidence. His failure to do so prejudiced Northrop.

The Fourth Amendment limits police officers' authority to detain individuals. U.S. Const. Amend. IV ("The right of the people to be secure in their persons . . . against unreasonable . . . seizures . . . shall not be violated".). Specifically, an officer cannot arrest an individual absent probable cause, i.e., a "fair probability" that the individual has either committed or intends to commit a crime. *United States v. Sokolow*, 409 U.S. 1,7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). Further, an officer cannot even briefly detain an individual unless the officer reasonably suspects the individual has been involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

There is no question that Jackson and collins detained Northrop. Although not immediately arrested, Northrop was subjected to the type of brief investigatory stop described in *Terry*.

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[5]In this petition, Northrop does not challenge the Michigan Court of Appeals' articulation of the legal principles applicable to his Sixth Amendment claim. Instead, Northrop insists the court misapplied those legal principles in denying his claim. Accordingly, we decide whether the Michigan Court of Appeals unreasonably applied controlling precedent in finding Northrop had failed to show Braverman performed ineffectively.

In *Terry*, the Supreme Court explained that an investigatory stop occurs when police use some form of coercion: "Obviously, not all personal intercourse between policemen and citizens involve seizures of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." *Id.* at 19 n.16 (internal quotations omitted). The test is whether, considering all of the circumstances, "a reasonable person would feel free to decline the officers requests or otherwise terminate the encounter." *Id.*

Here, as reasonable person in Northrop's position would not have felt free to terminate the encounter with Jackson and Collins. Northrop sought to leave the area before Jackson directed Collins to stop him. Jackson has testified that he would not have let Northrop walk away "during my investigation of him . . ."[6] And the officers gave Northrop a clear indication that he was not free to leave by asking him to produce identification and then empty his pockets.[7] The

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[6]Jackson testified at the trial court's hearing on Northrop's ineffective assistance of counsel claim. *People v. Ginther*, 212 N.W. 2d 922, 924 (Mich. 1973) (establishing state court proceeding for claims of ineffective assistance of counsel).

[7]The dissent challenges this and argues that the Michigan Courts could reasonably find that no law enforcement officer restrained Northrop. Contrary to the dissent's assertion, the record supports Northrop's claim that Officer Collins stopped Northrop after Northrop attempted to exit the bus station as Officers Collins and Jackson approached. The dissent is also wrong in suggesting that Northrop approached the Officers at the Officer's request.

At the *Ginther* hearing, Officer Jackson testified:

Q. You didn't talk to Mr. Northrop while he was seated?

A. No.

* * *

Q. How did Mr. Northrop get out of his seat?

A. He stood up.

Q. Without you or your partner asking him or telling him to stand up?

A. Correct.

Q. So, at this point prior to Mr. Northrop just standing up up on his own, you and your partner had not conducted any personal surveillance to determine if there were any narcotic selling or any such activity being conducted by Mr. Northrop or this other gentleman in the green Used outfit, had you?

A. No.

Q. So, after Mr. Northrop stood up, did he proceed to walk anywhere?

A. Yes.

Q. Where did he proceed to walk to?

A. Walk towards myself and the way myself and Mr. [Officer] Collins had came in.

Q. Had you said anything to Mr. Northrop, you or your partner at this point?

A. No.

Q. Did anyone stop Mr. Northrop from walking past you and your partner?

A. Yes. I advised my partner to stop Mr. Northrop.

Q. You told Officer Collins to stop him?

A. Yes.

Q. Did Officer Collins do that.

evidence before the Michigan Courts and the district court do not support the dissent's assertion that "Collins said repeatedly that his partner was initially talking to Northrop while Northrop was 'sitting there.'" Infra at___.[8]

A. Yes.

Q. Otherwise, Mr. Northrop would have kept on walking?

A. I assume so, yes.

Ginther Hearing III at 9-11, Joint Appendix at 404-06. *See also, Ginther* Hearing III at 32-33, Joint Appendix at 427-28. (Officer Jackson testifying that he "wouldn't have let him leave until you were satisfied your investigation had been concluded.")

[8]At the Waiver trial, only Officer Collins gave substantive testimony about the stop. Officer Jackson did not. In his trial testimony, Officer Collins did make a general reference that: "when we asked Mr. Northrop to come here to question him he had, I observed him slip the bag off his arm and place it up under the seat." But follow up trial testimony shows that Officer Collins did not observe his partner, Officer Jackson's, initial contact with Northrop:

Q. And you were, you and your partner were next to each other?

A. My partner and I weren't next to each other. We came in through different doors.

Q. Okay. But you, you came, didn't your partner come over to where this other person [Petitioner Northrop] was?

A. When I told, when I entered the bus station I asked Mr. Northrop. I'm sorry, I asked the other subject to come to me. My partner, *I believe*, he went to Mr. Northrop.

* * *

Q. Okay. And did you, when you were talking to this

Because Northrop was subjected to a *Terry* stop, the question turns to whether Jackson and Collins had a sufficient justification for making such a stop. They did not.

Police officers may initiate an investigatory detention only if they have reasonable suspicion of criminal activity. *Id.* at 21-22. An officer must be able to point to specific and articulable facts, together with rational inferences drawn from those facts, that reasonably suggest criminal activity has occurred or is imminent. Reasonable suspicion is based on the totality of the circumstances and has been defined as requiring "articulable reasons" and "a particularized and objective basis for suspecting the particular person . . . of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

Information from an anonymous informant may provide reasonable suspicion to conduct an investigatory detention. *Alabama v. White*, 496 U.S. 325, 326-27, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). However, because any anonymous informant does not bear the responsibility of having to answer for misinformation designed to harass, an anonymous tip must bear some evidence of reliability. Courts assess the reliability of an anonymous tip under the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230-31, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Typically, courts have found reasonable suspicion for a stop only when the police know the tipster to be

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individual, did you see your partner do anything in relationship to Mr. Northrop at all?

A. I don't remember. I was investigating the subject in the green outfit.

Waiver trial at 18-20, Joint Appendix at 53-55.

reliable or when the tip contains independently verifiable details showing knowledge. *See, e.g., United States v. Taylor*, 162 F.3d 12, 19-20 (1st Cir. 1998) (finding reasonable suspicion to stop suspect's car because tip from known, reliable informant provided specifics aas to make and color of car, its registration number, description of occupants, and neighborhood where they were making drug drops); *United States v. Villalobos*, 161 F.3d 285, 290-91 (5th Cir. 1998) (finding reasonable suspicion to stop suspect's vehicle because anonymous tip described, and police corroborated, the vehicle, its point of entry into United States, and it route); *United States v. Harris*, 39 F.3d 1262, 1269 (4th Cir. 1994) (finding reasonable suspicion to stop a driver because reliable informant described suspect and car and correctly predicted future action); *United States v. Walker*, 7 F.3d 26, 31 (2d Cir. 1993) (finding reasonable suspicion to stop individual based on corroborated information from anonymous informant regarding individual's appearance and travel plans).

For example, in *White*, the Supreme Court found an anonymous tip could support an investigatory stop only because the tip contained sufficient predictive information to show its reliability. 496 U.S. at 331. The anonymous informant told police that the defendant would leave a particular apartment at a particular time in a particular vehicle, that she would be going to a particular motel, and that she would be in possession of cocaine. Because the information was corroborated by independent police work, the Court found that, while a "a close case," the anonymous tip, "as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop." *Id.*

In *Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), the Supreme Court found insufficient evidence to create reasonable suspicion necessary for a *Terry* stop under circumstances similar to those presented in this case. An

anonymous caller reported to police that a young black male, wearing a plaid shirt, was standing at a particular bus stop and carrying a gun. Officers went to the bus stop and saw three black males. One of the males, J.L., was wearing a plaid shirt. Although the officers did not observe any other evidence that raised suspicion of illegal conduct, one of the officers frisked J.L. and seized a gun from his pocket.

In finding this stop illegal, the Court held an anonymous tip indicating a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. *Id.* at 272. The police officers' suspicion that J.L. had a weapon did not come from their own observations but solely from a call made from an unknown location by an unknown caller. Because it gave no predictive information that would allow the officers to test the informant's knowledge or credibility, the tip lacked sufficient indicia of reliability to provide the reasonable suspicion needed to make a *Terry* stop:"An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity." *Id.*; *see also United States v. Payne*, 181 F.3d 781, 790 (6th Cir. 1999) ("The tip in this case had none of the indicia of reliability that courts traditionally examine. It was, so far as the record reveals, anonymous. It lacked detail and failed to predict any future events that could be monitored to provide corroboration."); *United States v. Wells*, 223 F.3d 835, 839 (8th Cir. 2000) ("Anonymous tip, however, is insufficient in itself to support a finding of probable cause.").

Here, Jackson and Collins stopped Northrop based solely on a tip from an anonymous source. The officers knew nothing about the informant. And in giving the tip, the informant only told the police that two black males, one wearing a particularly

type of name brand clothing, were selling drugs in the Greyhound Bus Station. The tip did not further describe Northrop. Nor did the tip provide any predictive information to allow the officers to assess its reliability. Further, the officers did not observe any suspicious behavior that would have justified the stop independent of the tip.[9]

Accordingly, the officers did not have the reasonable suspicion necessary to stop Northrop under *Terry*. This leads us to decide whether this illegal seizure rendered the cocaine evidence inadmissible. We find that it does.

As noted, the fruit of the poisonous tree doctrine provides that evidence discovered as the indirect result of a Fourth Amendment violation is inadmissible. Here, the officers seized Northrop in violation of the Fourth Amendment. After being illegally seized, Northrop confessed to possessing marijuana. This admission led to Northrop's arrest, which provided the justification for searching the duffel bag. Thus, the officers would not have discovered the cocaine in the duffel bag absent Northrop's illegal seizure. The cocaine was therefore inadmissable as fruit of the poisonous tree.

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[9]At the *Ginther* hearing, Jackson acknowledged the tip provided the only basis for the stop:

> Q. . . . . The information you received as a result of the radio run was, in effect, two black males suspected of selling narcotics, one dressed in a green Used jean outfit?
>
> A. Yes.
>
> * * *
>
> Q. And that's all the information you were operation on?
>
> A. Yes.

And Braverman should have recognized as much. He knew the officers stopped Northrop based solely on a non-predictive anonymous tip. Prior to Northrop's trial, the Supreme Court suggested such a tip generally could not support a *Terry* stop. *White*, 496 U.S. at 329. Indeed, in finding a stop based on a non-predictive anonymous tip unlawful, the Court in *J.L.*, applied standards discernable from *White* and other earlier cases. *J.L.*, 529 U.S. at 270-71. Finally, because the fruit of the poisonous tree doctrine has long excluded evidence recovered as a result of an unlawful seizure, *Segura*, 468 U.S. at 804; *Wong Sun*, 371 U.S. at 484-85, Braverman had ample notice that the unlawful stop made the cocaine evidence in admissible.

Attorney Braverman did not file any motion challenging the seizure or questioning of Northrop. Given the background, it is difficulty to imagine what tactical advantage, or cost, could justify Braverman's decision to let the stop go without challenge. *Strickland*, 466 U.S. at 688 (1984) ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.").

In finding that Attorney Braverman gave reasonable representation, the dissent relies upon Braverman's testimony that he did not feel Northrop was subject to an involuntary seizure. But as *Terry* explains:

> It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime–'arrest' in traditional terminology. It must be recognized that whenever a police officer accosts an individual sand restrains his freedom to walk away, he has 'seized' that person.

392 U.S. at 16.

More important, even if one credits Attorney Braverman's uncertain recollection of his conversation with Northrop, they still do not make his failure to file a motion to challenge Northrop's seizure reasonable. During his representation, Braverman knew that police had arguably seized Northrop based upon no more than an anonymous tip without any supporting verifiable detail. Against this, the filing of a motion to suppress had no accompanying tactical cost. A reasonable attorney would have tested Officers Collins and Jackson's stop.

Having found Braverman's representation deficient, we next address whether Braverman's performance prejudiced Northrop. To establish prejudice, Northrop must show a reasonable probability that, "but for counsel's unprofessional conduct, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Specifically, "[w]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Morrison*, 477 U.S. at 375.

We have already found that Northrop's Fourth Amendment claim had merit. Thus, we need only decide if the verdict at Northrop's trial "would have been different absent the excludable evidence . . . . " *Id.*

Michigan convicted Northrop of cocaine possession. Without the in admissible cocaine evidence, Michigan would obviously have failed to meet its burden of proving Northrop possessed cocaine. Thus, Braverman's failure to move for the

suppression of the cocaine evidence prejudiced Northrop.

But Respondent-Warden Trippett says Northrop must show more to establish prejudice. Respondent says Braverman's representation prejudiced Northrop only if it deprived him of a fair or reliable trial. Because the suppression of otherwise admissible evidence does not enhance the reliability of a verdict, Respondent says Braverman's failure to file a suppression motion could not have prejudiced Northrop.

In support of this argument, Respondent relies on the Supreme Court's opinion in *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). In that case, the Court found trial counsel's failure to object that an aggravating factor in a death penalty case unconstitutionally duplicated an element of the underlying felony-murder charge did not constitute the "prejudice"required to show ineffective assistance of counsel. Rather than focusing on whether the ultimate outcome might have changed, *Lockhart* said habeas courts should focus on whether any error of trial counsel rendered the trial unreliable or proceeding unfair:

> Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Id. at 369-70; *see also Holman v Page*, 95 F.3d 481, 490 (7th Cir. 1996) ("[I]n the context of an ineffective assistance claim, 'a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. There must be more. Something must call into question the validity or fairness of the trial.'") (quoting *Morrison*, 477 U.S. at 382).

However, the Supreme Court has recently made clear that the outcome-determinative test set forth in *Strickland* generally determines whether trial counsel's performance prejudiced a habeas petitioner. *Williams*, 529 U.S. at 390-91("Cases such as . . . *Lockhart* . . . do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel does deprive the defendant of a substantive or procedural right to which the law entitles him."); *Glover v. United States*, 531 U.S. 198, 121 S. Ct. 696, 700, 148 L. Ed. 2d 604 (2001) ("The Court explained last Term that our holding in *Lockhart* did not supplant the *Strickland* analysis."). Likewise, this court has recognized that *Strickland's* prejudice test still applies to habeas petitions. *Carter v. Bell*, 218 F.3d 581, 591 (6th Cir. 2000).

The fairness analysis discussed in *Lockhart* supplants the *Strickland* analysis in only very limited circumstances. For example, though a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. *Nix v. Whiteside*, 475 U.S. 157, 175-76, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986). To similar effect, in *Lockhart*, the Court decided that the likelihood of a different outcome attributable to an incorrect interpretation of the law was a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by *Strickland*. *Lockhart*, 506 U.S. at 369-70.

In this case, we find no reason to set aside the standard set forth in *Strickland* and *Morrison* for determining whether counsel's deficient performance caused prejudice. Because Braverman's performance was prejudicial under this standard, we find merit in Northrop's Sixth Amendment claim.

In finding otherwise, the Michigan Court of Appeals unreasonably applied clearly established federal law. That

court decided Braverman's decision not to seek suppression of the cocaine evidence fell within the bounds of sound trial strategy. Although we recognize that "[j]udicial scrutiny of counsel's performance must by highly deferential," *Strickland* 466 U.S. at 689, we can think of no possible strategic merit in neglecting to seek the suppression of damning evidence discovered after a stop based solely upon an anonymous tip lacking predictive detail.

IV. Conclusion

For the reasons set forth above, we **AFFIRM** the judgment of the district court.

DISSENT

BOGGS, Circuit Judge, dissenting. I fully concur with the court's conclusion that the bag was searched lawfully incident to arrest, and with the rejection of the district court's basis for finding a violation of the Sixth Amendment. However, I consider as wholly inadequate the courts's alternative basis for finding ineffectiveness of counsel.

In affirming the writ in this case, the court does not respect the high bar that has been set for claims such as Northrop's. In order for us to affirm the grant of the writ, we must not only find attorney Braverman to have acted incompetently *based on the information he had at the time*, we must find the opposing interpretation under *Strickland*, which accords wide deference and a presumption of competence to trial counsel, to be so far-fetched that no reasonable court could credit it. *See Williams v. Taylor*, 529 U.S. 362, 411 (2000). Even prior to AEDPA, the existence of a valid Fourth Amendment claim not raised at

trial was insufficient for federal habeas relief. *See Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). "Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . . . " *Ibid.* The provisions of AEDPA requiring unreasonableness of a state decision, cited by the court in its initial discussion, *supra* at 5, but applied only in a conclusory manner to the decision of the Michigan Court of Appeals, *People v. Northrop*, 541 N.W. 2d 275, 277 (Mich. Ct. App. 1995), place an even heavier burden on the petitioner than the one imposed by *Morrison*.

Taking the facts as they have been presented to us, Northrop cannot take the first step toward meeting his burden, because he does not even have a valid Fourth Amendment claim based on his initial encounter with the police. A *Terry* stop, as noted by the court, requires coercion that restrains the liberty of the citizen. Two instances of coercion are adduced to support the finding that Northrop was seized. Primarily, the court relies on Northrop's being stopped as he "sought to leave the area." *Supra*, at 10. Secondly, it relies on the supposed compulsion placed on Northrop to empty his pockets and produce his identification. The record is at best ambiguous as to both of these "events," however, and insufficient for us to alter the contrary factual findings of the district court and the state courts.

Although *Mr. Northrop*, on appeal, claims to have been restrained from leaving during his initial stop by Officers Jackson and Collins, *the district court made no such finding.* The district court describes the initial encounter thus:

> "Officer Oliver Collins testified at petitioner's trial that Petitioner was carrying a brown bag on his arm when the officer approached him. After Officer Collins and his partner asked Petitioner to approach them for questioning,

Petitioner slipped the gag off his arm and kicked it under the seat. The questioning occurred ten to thirty feet away from where the bag was located under the seat."

(Dist. Ct. Op., at 12). The district court's opinion (and the evidence presented at Northrop's trial) provide no support for Northrop's current claim that he was restrained from leaving the bus station when he stood up from his chair and answered the summons of the officers. [1]Any reasonable interpretation of the district court's opinion would view it as choosing between alternate accounts of the incident contained in the record and making not only an "apparent finding of fact" (as discussed in *Moore* and *Wolfe, supra* at 5), but an actual finding, that the

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[1]This should not be misconstrued as a claim that there is no support *anywhere* for petitioner. Officer Jackson's testimony at the *Ginther* hearing three years after the incident, although relied upon by the court, was contradicted not only by Braverman's recollection of what Northrop told him about the incident, but also by Officer Collins's testimony at Northrop's trial, a few months after the arrest. Collins's said repeatedly that his partner was initially talking to Northrop while Northrop was "sitting there." (Trial Tr. At 19, J.A. 54), and that his partner "brought him over to me," (Trial Tr. At 22, J.A. 57), after Collins discussion with Northrop's compatriot.

Q. (By Mr. Braverman, continuing): "Okay. Now, Mr. Northrip [sic] didn't have this bag *when he came over to you*, right?

A. "When Mr. Northrip [sic] *got up with my partner*, that's when I saw him . . .kick it under the seat. (Trial Tr. At 24, J.A. 59) (emphasis added).

This is completely inconsistent with Northrop attempting to slip away prior to any interview. Officer Jackson was apparently confused three years later, as comparison of the conflicting testimony shows, over which of the partners had done what to which of the two suspects, and his testimony does not appear to have formed the basis of any previous adjudication. I see no reason for the court now to pick from the record this version of the facts, even if it had the power to do so - exactly what occurred at the Greyhound station is uncertain and perhaps unanswerable. Fortunately, the answer does not matter, because *the only relevant question is Braverman's knowledge in 1990*, and even new information perhaps given by Officer Jackson in 1993 cannot affect this determination.

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officers called to Northrop and that he stood up and came over to see what they wanted. We review the district court's factual on habeas only for clear error, *DeLisle v. Rivers*, 161 F.3d 370, 380 (6th Cir. 1998) (en banc), and the majority has not found the district court's account, which omits any mention of Northrop's seeking to leave, to be clearly erroneous.

Although concluding that a *Terry* stop had occurred - a legal conclusion to which no deference is due - the district court also made no finding that the officers had compelled Northrop to empty his pockets, and no findings about the officers' tone, manner, or show of force. We cannot assume compulsion *per se*. *Florida v. Bostick* held that no "seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage - as long as the officers do not convey a message that compliance with their requests is required." 501 U.S. 429 (1991) (citation and internal quotation marks omitted). In a case factually similar to the current one, we stated that "officers did not engage in any overbearing or coercive activity in making these requests and that a consensual encounter occurred. We find that there is nothing to indicate that the officers conveyed a message that compliance with their request to speak with defendant and examine his ticket was required, and no *Terry* stop occurred." *United States v. Peters*, 194 F.3d 692, 698 (6th Cir. 1999); *see also United States v. Frazier*, 936 F.2d 262, 265 (6th Cir. 1991) ("We hold that because the defendant voluntarily gave the ticket to the officer, and the officer did not refuse to return the ticket to the defendant, taking the ticket did not constitute a seizure.").

The question then becomes what evidence exists or existed that the officers' statements conveyed the message that Northrop's compliance was required. There is and was none. Officer Jackson equivocated about whether he *would have done* anything had Northrop refused to comply. Compare

Jackson's statement quoted by the majority, *supra* at 12 n. 7, saying he would not have let Northrop walk away during his investigation. Of course, no one - even Officer Jackson - knows what he would have done, and it is an issue of only peripheral importance. What the record discloses the officers *did* do is to explain that they had received a tip, ask some questions, and request that Northrop, "if he would," empty his pockets. Depending on the way the officers behaved, this might constitute a *Terry* stop, but it might not, and Northrop evidently led Braverman to believe that it did not.

Even were there sufficient record evidence to support finding a *Terry* violation, we are not asked to adjudicate whether, in a counterfactual universe, a successful suppression motion could have been made by Northrop in 1990. Northrop's petition is based on the supposed utter failure of Braverman to litigate an obvious and decisive Fourth Amendment claim. But based on what Northrop told Braverman about his encounter, Braverman had no reason to believe that a *Terry* claim would be successful. For purposes of evaluating compliance with the Sixth Amendment, we are forbidden in the strongest terms from second-guessing counsel's conduct based on what has been discovered by more than a decade of further proceedings. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U. S. at 689.

In the ineffectiveness hearing afforded Northrop by Michigan, Braverman testified to what he was told about Northrop's "attempt to leave." Braverman believed Northrop had been asked to come over and speak to the officer, and thjat his movement was prompted by what "looks like a request and taken in connection with my conversation with Mr. [Northrop],

it appeared like a request." (*Ginther* Hr'g I, at 38, J.A. 256). Northrop never told Braverman that he had been trying to leave and had been stopped by the police. The court cannot rely on Northrop's being stopped when evaluating Braverman's performance. It is not a fact we "know" today, and even less a fact that Braverman was privy to when deciding whether to make a suppression motion.[2]

Northrop told his attorney that he was asked to approach the officers, a conversation occurred between the officers, and that one of them asked Northrop to empty his pockets "if he would." Northrop said "sure" and did so. (*Ginther* Hr'g I, at 62-66, J.A. 280-84). Braverman made clear his "perspective at the time," the perspective from which we are to judge his conduct and choices. *Strickland*, 466 U.S. at 689. "Taking all the information I got into consideration, including the way Mr. [Northrop] relayed the way this happened, I did not feel Mr. [Northrop] was doing anything involuntarily. That was the way I perceived it." (*Ginther* Hr'g I, at J.A.. 283). A more aggressive, insightful, or devious attorney might not have been so quick to equate his client's characterization of

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[2]As to the initial questioning, the state court, after the *Ginther* hearing, has spoken to these matters. The Michigan trial court emphatically stated "that Mr. Braverman understood . . . . through his interview with Mr. [Northrop,] that Mr. [Northrop] voluntarily emptied his pockets, advised that he [had] bud in his sock and the like. That's my finding." (*Ginther* Hr'g V, at 23, J.A. 523). AEDPA demands that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C.§ 2254(e)(1). The court apparently agrees that we must deem Northrop to have told Braverman that his responses to the police were voluntary, but it then imposes a *unarguable, constitutional* duty for counsel to disbelieve his client and pursue claims inconsistent with his client's statements. Otherwise, apparently, he is "not acting as counsel" under *Strickland*. The court's holding comes close to mandating that a Fourth Amendment challenge be part of every criminal proceeding where there evidence to be suppressed, something that goes well beyond what the Sixth Amendment requires, and which cannot serve the ends of the judicial system or provide the appropriate latitude to defense counsel.

"voluntariness" with the legal definition. Nevertheless, it is within the minimum range of competence to perceive a claim as weak, when that claim is based on compulsion, and your own client indicates that he acted freely.

The court treats as patently obvious the presence of an involuntary detention prior to Northrop's admission of marijuana possession, stating "[t]here is no question that Jackson and Collins detained Northrop." *Supra* at 10. Even with the benefit of ten years' hindsight, I do not think there is "no question" about this, as I have discussed. Certainly, Braverman did not perceive that there was "no question" about the matter, primarily because in 1990 *Northrop did not believe he had been detained during his initial questioning.* Braverman could not rely on Mr. Northrop as his expert on the Fourth Amendment, but he necessarily relied on him as to Northrop's own state of mind and as to the coerciveness of the officers' conduct. Because Braverman believed that a *Terry* stop had not occurred,[3] and it is not unreasonable to find his belief within the range of professional competence, his failure to file a suppression motion cannot meet the standard of constitutional ineffectiveness required on federal habeas, and Northrop's Sixth Amendment claim must fail.

It appears to me that, in granting the writ, the court has filtered the factual record through the lens of the current assertions of the petitioner, and contradicted *Morrison's* and *Strickland's* Sixth Amendment jurisprudence, as well as the more recent teaching of *Williams v. Taylor* as to limits on our review of state judicial decisions. Had either of my colleagues represented petitioner, he might well have succeeded in suppressing the evidence that led to his conviction. Unfortunately for petitioner, we are not called upon to decide solely if there was error in what was done by Officers Collins

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[3]This makes it irrelevant whether Braverman should have recognized there was an insufficient basis for a *Terry* stop.

and Jackson, Attorney Braverman, or even the Michigan judicial system, much less whether we could have done better. Under AEDPA, the necessary inference of the court's opinion is that all reasonable courts would fin Braverman "grossly incompetent" in believing his client's claim that he felt no compulsion to accede to the officers' requests. This is a client who also obligingly volunteered the information that he had "bud" hidden in his sock, in response to a pro forma request about whether he had awny drugs. Whatever we may think about Mr. Braverman's overall legal acumen, he was certainly in the best position to assess Mr. Northrop's credibility when he described his encounter with the police. I cannot find gross legal incompetence in these circumstances, and I certainly do not believe it was unreasonable that the Michigan courts failed to find it.

I therefore respectfully dissent.

COURT OF APPEALS - ORDER

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES NORTHROP, Petitioner-Appellee,	)	
	)	**ORDER**
v.	)	
DAVID TRIPPETT, Respondent-Appellant.	)	

BEFORE: BOGGS and CLAY, Circuit Judges; and GWIN, *District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Boggs would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN, Clerk

*Hon. James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

COURT OF APPEALS - JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES NORTHROP.
Petitioner-Appellee,

v.

DAVID TRIPPETT, Warden
Respondent-Appellant.

Before: BOGGS and CLAY, Circuit Judges; GWIN, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Bay City.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CHARLES NORTHROP,
a/k/a CHARLES GLOVER,

Petitioner,

v.

CASE NO. 98-CV-10133-BC
Hon. Victoria A. Roberts

DAVID TRIPPETT,

Respondent.
_____/

OPINION AND ORDER

I. Introduction

Before the Court is Petitioner Charles Northrop's Habeas Corpus Petition under 28 U.S.C. § 2254. On November 29, 1990, a circuit court judge in Wayne County, Michigan found Petitioner guilty of possessing 50 grams of cocaine. *See* M.C.L.A. § 333.740(2)(a)(iii); M.S.A. § 14.15(7403)(2)(a)(iii). The facts leading to Petitioner's conviction have been summarized by the Michigan Court of Appeals as follows:

> Defendant was arrested at the Greyhound bus station in Detroit by two uniformed Detroit police officers. Defendant

> was arrested when he responded to an officer's query regarding whether he was selling drugs by giving the incriminating reply that he had marijuana in his sock. The officer placed defendant under arrest for violation of the marijuana ordinance and confiscated his bag, which was found to contain toiletries and a large quantity of suspected cocaine.

People v. Northrop, 213 Mich. App. 494, 495-96 (1995).

On December 13, 1990, the trial court sentenced Petitioner to imprisonment for 8 to 20 years. Petitioner appealed his conviction and sentence. While his case was pending on appeal, it was remanded to the trial court for a Ginther hearing (GH) on Petitioner's claim of ineffective assistance of counsel.[1] The trial court determined at the conclusion of the hearing that Petitioner was not deprived of the effective assistance of counsel.

The Michigan Court of Appeals subsequently affirmed Petitioner's conviction and sentence. *See Northrop*, 213 Mich. App. At 495. The Michigan Supreme Court denied leave to appeal, *see People v. Northrop*, 453 Mich. 90 (1993),[2] and on January 31, 1997, it denied Petitioner's motion for reconsideration.

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[1]*See People v. Ginther*, 390 Mich. 436 (1973).

[2]Two justices voted to grant leave to appeal to consider Petitioner's ineffective -assistance-of-counsel claim.

DISTRICT COURT ORDER AND OPINION

On May 1, 1998, the Clerk of this Court received Petitioner's Habeas Corpus Petition. Petitioner alleges through counsel that:

I. [HE] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, WHERE DEFENSE COUNSEL FAILED TO FILE A MERITORIOUS MOTION TO SUPPRESS THE ONLY EVIDENCE AGAINST HIS CLIENT.

II. THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW CONSTITUTED AN ACQUITTAL OF POSSESSION OF 50 TO 225 GRAMS OF COCAINE. PETITIONER'S SUBSEQUENT CONVICTION OF THAT OFFENSE THEREFORE VIOLATED HIS DOUBLE JEOPARDY PROTECTIONS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

Petitioner has exhausted state court remedies for these claims. *See* 28 U.S.C. §2254(b)(1) & (c).

Respondent, who has answered the Habeas Petition through counsel, argues that review of Petitioner's claims is barred by the statute of limitations. Respondent also argues that:

I. THE RECORD DOES NOT SUPPORT THE CONCLUSION THAT PETITIONER WAS

DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

II. THE TRIAL COURT'S FACTFINDING WAS SUFFICIENT TO SUSTAIN PETITIONER'S CONVICTION FOR POSSESSION OF COCAINE, AND HIS STIPULATION TO THAT EFFECT WAIVED ANY RELATED CLAIM OF ERROR.

III. WHERE PETITIONER HAS HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE ALL ISSUES RAISED IN THIS PETITION IN STATE COURT, THIS COURT MUST ACCORD FULL FAITH AND CREDIT TO THE JUDGMENT OF A STATE COURT.

II. The Statue of Limitations

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996)("AEDPA"), govern this case because Petitioner filed his Habeas Petition after the effective date of the AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Among other things, the AEDPA amended 28 U.S.C. §2244 to include a new one-year period of limitations for habeas petitions brought by prisoners challenging their state court

judgments.[3] In most cases, the one-year period of limitations

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Section 2244 reads in relevant part as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of–
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> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (1996).

will run from the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. *See* 28 U.S.C. §2244(d)(1)(A).

The Michigan Supreme Court denied Petitioner's motion for reconsideration in this case on January 31, 1997. The state court judgment became "final" 90 days later (May 1, 1997) when the time for seeking a writ of certiorari expired. *See* Sup. Ct. R. 13.1; *Kapral v. United States*, 166 F.3d 565, 575 (3rd Cir. 1999); *Ross v. Artuz*, 150 F.3d 97, 98 (2nd Cir. 1998); *Thomas v. Straub*, 10 F. Supp. 2d 834, 835 (E.D. Mich 1998).

Although Petitioner's Habeas Petition was stamped "filed" on May 7, 1998, the Clerk of the Court received the Petition on May 1, 1998, six days earlier. May 1, 1998, was the 365th day after Petitioner's conviction became final. Therefore, the Habeas Petition is timely, having been submitted on the 365th day after Petitioner's conviction became final. *See Towns v. United States*,__ F.3d____, No. 98-3727, 1999 WL 649139, at *1 (6th Cir. August 26, 1999) (concluding that the one-year deadline for filing a motion under §2255 in a case that became final before the AEDPA became law was the 365th day after the effective date of the AEDPA).

III. Standard of Review

Having determined that Petitioner's claims are not barred by 28 U.S.C.§2255(d)(1), the Court will proceed to address Petitioner's claims on the merits. The AEDPA altered the standard of review that federal courts must consider when deciding whether to grant habeas corpus petitions brought under 28 U.S.C. §2254. *Felker v. Turpin*, 518 U.S. 651, 654 (1996); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*,__U.S.__ , 118 S. Ct. 1044 (1988). The altered standard of review found in 28 U.S.C.§2254(d) "requires heightened respect for state court factual and legal determinations." *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998).[4] Federal courts may grant Writ of Habeas Corpus

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Section 2254(d) of the United States Code. Title 28, reads as follows"

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
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> > (1)resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2)resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

if the state court's adjudication of the petitioner's claims was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. 28 U.S.C. §2254(d)(1). In the Sixth Circuit,

> the writ will issue if the unreasonableness of the state court's application of clearly established precedent is not debatable among reasonable jurist. The unreasonableness of the application will be not be debatable if it is so offensive to the precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes.

Tucker v. Prelesnik, 181 F.3d 747, 753 (6th Cir. 1999).

IV. Alleged Ineffective Assistance of Trial Counsel

Petitioner's first claim is that he was denied effective assistance of trial counsel because his trial attorney failed to file a motion to suppress the cocaine that Petitioner allegedly possessed. Petitioner contends that discovery of the duffel bag, which contained the cocaine in dispute, occurred during an unlawful detention and an illegal search.

The Fourth Amendment to the United States Constitution, which is enforceable against the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), protects citizens "against unreasonable searches and seizures." *See* U.S. Const. amend. IV. Although Fourth Amendment claims are not cognizable on habeas review, *see*

Stone v. Powell, 428 U.S. 465, 481-82 (1976), habeas petitioners may assert Sixth Amendment claims based on defense counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment. *Kimmelman v. Morrison*, 477 U.S. 365, 382-83 (1986).

Failure to file a motion to suppress evidence does not constitute *per se* ineffective assistance of counsel. *Id.* at 384. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must [] prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence . . . . " *Morrison*, 477 U.S. at 375. In Michigan, a motion to suppress may be filed before or even during trial. *People v. Ferguson*, 376 Mich. 90, 94-95 (1965).

In the present case, Petition claims that there were three meritorious grounds for suppression: (1) the police lacked reasonable suspicion to detain him; (2) the police failed to advise him of his constitutional rights; and (3) the duffel bag

was not validly searched incident to his arrest. Each of these claims will be addressed in turn.

A. Reasonable Suspicion

Petitioner first claims that the police lacked reasonable suspicion to detain him and the incriminating evidence obtained by the police was the result of the illegal investigative detention. Petitioner notes that the police did not see anyone engaged in drug-related activity at the bus station and they did not survey the scene to determine if anyone was selling drugs.

The United States Court of Appeals for the Sixth Circuit recently explained that the:

> [p]olice may briefly stop an individual for investigation if they have a 'reasonable suspicion' that the individual has committed a crime. *United States v Palomino*, 100 F.3d 446, 449 (6th Cir. 1996). . . . 'Reasonable suspicion' is more than an ill-defined hunch; it must be based upon 'a particularized and objective basis for suspecting the particular person. . . of criminal activity.' *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 66 L. Ed 2d 621 (1981). It requires 'specific and articulable facts which, taken together with ration inferences from those facts, reasonably warrant' an investigatory stop. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct.1868, 20 L. Ed 889 (1968); *United States v. Erwin*, 155 F.3d 818, 822 (6th Cir. 1998), *cert. denied*, _ U.S.__ , 119 S. Ct. 906, 142 L. Ed 2d 904 (1999). The standard outlined in *Terry* and its progeny is not onerous. The requisite level of

> suspicion 'is considerably less than proof of wrongdoing by a preponderance of the evidence.' *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989); *McPherson v. Kelsy*, 125 F.3d 989, 993 (6th Cir. 1997), *cert. denied*,__ U.S.__ , 118 S. Ct. 1370, 140 L. Ed 2d 518 (1998). Moreover, reasonable suspicion can arise from evidence that is less reliable than what might be required to show probable cause. *Alabama v. White*, 496 U.S. 325, 330 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990); *McPherson*, 125 F.3d at 993.

Houston v. Clark County Sheriff Deputy John Does, 174 F.3d 809, 813 (6th Cir. 1999).[5] "Specific and articulable" details, when independently corroborated by the police, constitute sufficient "indicia of reliability" to justify a forcible stop. *Alabama v. White*, 496 U.S. 325, 326-332 (1990).

Officer Oliver Collins testified at Petitioner's trial that,

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[5]Stated somewhat differently,

> a police officer must have a reasonable suspicion to conduct a Reasonable suspicion requires that '[t]he officer. . . be able to articulate something more than an "inchoate and unparticularized 'hunch.'" The Fourth Amendment requires "some minimal level of objective justification" for making the stop.' *United States v. Sokolow*, 490 U.S. 1, 7 (1989)(citations omitted). The determination of whether a reasonable suspicion exists 'is to be based upon all the circumstances' surrounding the stop, *United States v. Williams*, 754 F.2d 672, 674 (6th Cir. 1985), and is a less demanding requirement than probable cause.
> *Sokolow*, 490 U.S. at 7.
>
> *United States v. Ushery*, 968 F.2d 575, 578-79 (6th Cir. 1992).

on August 29, 1990, the police received information concerning two black men who were selling drugs in the Greyhound bus station in Detroit. One of the men was described by the tipster as being dressed in a green baseball cap and a green outfit bearing the brand name "Used." The other individual's attire was not described. The police arrived at the bus approximately eight minutes after receiving the radio call. At first, they stopped a young man who was wearing a green outfit, but the clothing did not match the description they had of a Used jeans outfit. Then they saw someone matching the description given by the tipster. Officer Collins identified Petitioner at trial as the individual who was seated with the man in the green Used outfit. Officer Collins testified that he tried to acquire witnesses, but that no one in the lobby of the bus station would admit to observing any illegal activity. *See* WT II at 7-34.[6]

In summary, the police found Petitioner in the location mentioned by the tipster minutes after the police received the tipster's call. Petitioner was seated next to, and conversing

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[6]For purposes of this opinion, "WT" refers to the transcript of Petitioner's waiver trial and sentence, which consists of the following four volumes: WT I (October 2, 1990); WT II (October 31, 1990); WT III (oral stipulation asserted on November 29, 1990); and WT IV (the sentence proceeding held on December 13, 1990). "GH" refers to the Ginther hearing, which consists of five volumes: GH I (November 17, 1993); GH II (November 18, 1993); GH III (December 8, 1993); GH IV (December 14, 1993); and GH V (March 1, 1994).

with, a person who fit the particularized description given by the tipster. These specific and articulable facts constituted at least the minimum level of objective justification and reasonable suspicion for stopping Petitioner. The police were not required to corroborate the tip by conducting an independent investigation upon arriving at the bus station. *United States v. Miller*, 925 F.2d 695, 699 (4th Cir. 1991). The Court therefore concludes that a motion to suppress evidence based on an alleged lack of reasonable suspicion to detain Petitioner likely would have failed. Accordingly, defense counsel's performance was not deficient for failing to file a motion to suppress on the basis of a lack of reasonable suspicion.

B. Miranda Warnings

Petitioner alleges next that the cocaine in the duffel bag which he carried on his arm in the bus station should not have been admitted into evidence because the cocaine was seized pursuant to an illegal arrest. The arrest supposedly was illegal because it followed Petitioner's comment about having marijuana in his sock. Petitioner contends that the comment was inadmissible because the police had not advised him of his constitutional rights before interrogating him.

Petitioner had a constitutional right to be forced to incriminate himself. *See* U.S. Const. amend. V. To safeguard

this right, the Supreme Court has held that the prosecution may not use statements stemming from custodial interrogation of the defendant unless, prior to questioning, the police used specific procedural safeguard. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Specifically, suspects must be informed that they have a right to remain silent, that any statement they make can be used as evidence against them, and that they have a right to the presence of a retained or appointed attorney. *Id.*

"Custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* Significantly, for purposes of this case, citizens who are temporarily detained pursuant to *Terry*, are not in custody and, therefore, they are not entitled to the *Miranda* warnings enumerated above. *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). An investigative *Terry* stop may evolve into an arrest, *Houston*, 174 F.3d at 814, but "the ultimate inquiry is. . . whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *accord, Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *United States v. Salvo*, 433 F.3d 943, 948 (6th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1805 (1998).

Petitioner had not been arrested or restrained to the

degree associated with a formal arrest when he mnade the incriminating remark about having a marijuana bud in his sock. He merely was detained temporarily for questioning about whether he possessed or was selling drugs. Because Petitioner was not in custody for purposes of *Miranda*, he was not entitled to *Miranda* warnings before he made the admission about having a marijuana bud in his sock. For this reason, the trial court likely would have denied a motion to suppress based on the failure to give *Miranda* warnings before Petitioner made his incriminating remark. Defense counsel's performance was not deficient for failing to file a motion to suppress on the basis that Petitioner was not advised of his constitutional rights before making an incriminating remark.

C. Search Incident to Arrest

Petitioner's third and final reason for asserting that his attorney should have filed a motion to suppress is that the search of the duffel bag containing cocaine was not a valid search incident to arrest. Petitioner contends that, because the bag was not within his immediate control at the time of his arrest, the police were not justified in searching it.

The police did not have a warrant to search the duffel bag, and searches conducted without prior approval by a judge or magistrate generally are unreasonable under the Fourth Amendment. *United States v. Wright*, 577 F.2d 378, 380 (6th

Cir. 1978)(quoting *Katz v. United States*, 389 U.S. 347, 357 (1967). An exception to the warrant requirement authorizes the police to conduct a search incident to an arrest. *Id.* Such searches, however, must be confined to "the arrestee's person and the area 'within his immediate control'–construing that phrase to mean the area from with which he might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969).

Officer Oliver Collins testified at Petitioner's trial that Petitioner was carrying a brown bg on his arm when the officer approached him. After Officer Collins and his partner asked Petitioner to approach them for questioning, Petitioner slipped the bag off his arm and kicked it under the seat. The questioning occurred ten to thirty feet away from where the bag was located under the seat. At some point, Officer Collins or his partner retrieved the bag and, following Petitioner's arrest for admitted possession of marijuana, Officer Collins searched the bag and discovered the cocaine. *See* WT II at 10-13, 24-27, and 36-37.

According to the testimony, the duffel bag was under the seat, some distance away from where Petitioner initially was questioned by the police. The bag was not within Petitioner's immediate reach or control at the time. Durixg the subsequent questioning, the police had custody of the bag and

there was no reason to fear that Petitioner would gain access to the bag. Because the bag was not within Petitioner's immediate reach or control, the search of the bag cannot be considered incident to the arrest.[7]

Moreover, "the right to seize is not necessarily the right to search. . . " *Wright*, 577 F.2d at 381 n.3. Once the bag was safely in the officers' possession, there was no legitimate reason for the police to search it immediately. They could have obtained a warrant to search the bag. *See id* at 381 n.2 & 3.[8] The police were not entitled to create a situation which

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[7]The Sixth Circuit's recent opinion in *United States v. Peters*, F.3d_, No. 98-3282, 1999 WL 791664 (6th Cir. October 6, 1999) is not to the contrary. In the *Peters* case, agents of the Drug Enforcement Administration observed Peters disembark a train carrying an attache case, leave the train station, and board a bus. The agents also observed Peters place the attache case in an overhead rack on the opposite side of the bus from where he seated himself. The agents subsequently approached Peters and asked him, among other things, whether he had carried the attache case from the train station onto the bus. Peters responded by denying that he owned the bag, carried it through the train station to the bus, or placed it on the overhead rack in the bus.

The Sixth Circuit concluded that, by voluntarily abandoning the attache case, Peters forfeited any reasonable expectation of privacy in it, and, therefore, did not have standing to challenge the search of it. *See id.* at *3. Although Petitioner's defense at trial was that the duffle bag did not belong to him, there is no evidence in the record that he denied owning the bag when the police approached him in the bus station.

[8]*See also Peters*, 1999 WL 791664, at *1 (noting that the agents obtained a search warrant to open the attache case before examining its contents).

gave them an opportunity to search the bag ostensibly incident to the arrest. *Id.* at 381. Accordingly, the Court finds that Petitioner had a meritorious Fourth Amendment claim. Further, without the evidence seized from the duffel bag, it is likely that the verdict would have been different.

Having determined that Defense counsel's performance was ineffective, the Court must nonetheless determine whether habeas relief is warranted under the standards established in AEDPA. More specifically, the Court must determine whether the State court's adjudication was debatable among reasonable jurists or whether is was "outside the universe of plausible, credible outcomes." *Prelesnik*, 181 F.3d at 753.

1. State Court Opinion

It is well-established that a State court's decision on a claim of ineffective assistance of counsel is entitled to deference. *See* 28 U.S.C.§ 2254(d)(1); *Moore v. Johnson*, 101 F.3d 1069, 1075-76 (5th Cir. 1996), *vacated on other grounds*, 521 U.S. 1115 (1997). Here, the trial court concluded that Petitioner was not deprived of effective assistance of counsel because defense counsel articulated a reasonable basis – Petitioner's statement that he had voluntarily cooperated with the police – for not filing a motion to suppress. *See* GH V at 19-23. The Michigan Court of Appeals likewise found no ineffective assistance – apparently was persuaded by the

principle that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallenged." *Strickland*, 466 U.S. at 690. However, a review of the record convinces this Court that neither of these conclusions is plausible.

The trial court's conclusion that there was no ineffective assistance rests on the assumption that Petitioner consented to the search. In other words, if Petitioner consented, there was no basis for filing a motion to dismiss, and such a motion would have been denied. *See Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991). The problem with this approach, however, is that there is no evidence in the record that Petitioner actually consented to the search of the bag. As such, the trial court acted unreasonably in accepting counsel's failure to file a motion on such grounds. Indeed, its conclusion - in light of the evidence in the record - would not be debatable among reasonable jurists.

Similarly, the unreasonable conclusion of the Michigan Court of Appeals would not be debatable among reasonable jurists. It reasoned:

> . . . .[t]his Court is convinced that defendant was not denied his constitutional right to effective assistance of counsel because it is apparent from the proceedings that defense counsel considered motions to suppress evidence but was convinced, after his

> conversations with defendant and other investigation, that such motions would not be granted and that the most attractive trial tactic was to assert the defense that the luggage did not belong to defendant. Counsel obtained testimony of a bus station employee and defendant's girl friend, who had driven him to the bus station, that the bag containing the contraband was not seen in his possession before the arrest. Defendant counsel also presented testimony by defendant's mother that she had helped him pack his bags, that the particular bag involved was not among those that she had observed, and that the rather substantial amount of cash that defendant had in his possession at the time of his arrest was given to him before his trip by this mother. We find that defendant was not denied effective assistance of counsel.

Northrop, 213 Mich. App. At 497-98 (footnote omitted). Again, the problem with the analysis is that it is contrary to the facts brought out in the evidentiary hearing. In reality, defense counsel testified that he did not know if he deliberately considered filing a motion to suppress. GH II at 35.[9]

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[9]The colloquy between the prosecutor and defense counsel on cross-examination reads in relevant part as follows:

[THE PROSECUTOR]: All right. How did you grapple with all the principles that were involved in this case, and how did you resolve them in your own mind?

[DEFENSE COUNSEL]: Well, let me ask you, are we just – are we just referring to the suppression motion alone?

Moreover, it appears from the record that defense counsel did not fulfill his obligation to make a thorough investigation of the law and facts. He testified that he did not

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[THE PROSECUTOR]: The suppression motion alone.

[DEFENSE COUNSEL]: Well, of course, I talked to Mr. Glover [Petitioner].

[THE PROSECUTOR]: Right.

[DEFENSE COUNSEL]: And Mr. Glover was not incarcerated at – initially when I talked to him. And I think I talked to him and some, if not all, of this witnesses prior to the second. I can't recall. And, based on what Mr. Glover told me, and my review of the discovery. I – it looked – appeared to me that I had a situation where there was a voluntary, consensual search, and a bag that was not the property of Mr. Glover and/or could have been seized incident to a lawful arrest.

[THE PROSECUTOR]: Okay. And with that conclusion flowing from your analysis, what did you decide to do , if anything?

[DEFENSE COUNSEL]: I didn't file a motion.

[THE PROSECUTOR]: Okay. *Was that a conscious decision that you made? I mean, was there something that you simply forgot about or did you deliberately consider and declined to file the motion?*

[DEFENSE COUNSEL]: *I don't know that I deliberately considered it,* but when I look at cases like this, search and seizure is always something to be considered. And I'm sure that after looking at this I didn't file the motion.

[THE PROSECUTOR]: Was that because you concluded it was not a promising motion?

[DEFENSE COUNSEL]: I didn't think it was going to work myself, but I might have been wrong. But that was just my feeling.

GH II at 34-36 (emphasis added).

know if there had been grounds to file a motion to suppress. *See* GH I at 73. Apparently, Defense counsel erroneously believed that Petitioner lacked standing to challenge the search because Petitioner had told him the bag was not his. *See* GH I at 78 and II at 26 and 72. However, at the time of trial, neither federal nor state law required a proprietary interest in an object to challenge a search of the item. Instead, to have standing, a suspect needed to have only a "legitimate expectation of privacy" in the object searched. *United States v. Salvucci*, 448 U.S. 83, 95 (1980); *People v. Smith*, 420 Mich. 1, 7 (1984). Meanwhile, Officer Collins testified at trial that he saw the bag on Petitioner's arm. *See* WT II at 10. This testimony provided a basis for defense counsel to argue that Petitioner had a legitimate expectation of privacy in the bag. *Cf. Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

Further, while claiming that Petitioner had an expectation of privacy in the bag might have been at odds with his defense at trial that he did not own the bag, defense counsel was entitled to raise inconsistent defense theories. *See Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974) (stating that defense counsel has an obligation to investigate and assert all apparently substantial defenses available to the defendant in a proper and timely manner). Indeed, the trial judge stated at the Ginther hearing that he would not have questioned defense

counsel's credibility if counsel had argued alternative theories. *See* GH V at 24-25. Moreover, the trial judge would not have been entitled to consider Petitioner's testimony in support of a motion to suppress as evidence against Petitioner at trial. *See Salvucci*, 448 U.S. at 89-90 (quoting *United States v. Simmons*, 390 U.S. 377, 394 (1968). Even defense counsel was not convinced that Petitioner would have "lost anything" by bringing a motion to suppress. *See* GH I at 73. Yet, he failed to do so when the facts clearly warranted it, and the State court unreasonably found that he provided effective assistance.

In sum, a meritorious motion to suppress could have been filed based on the illegal search of the duffel bag. Moreover, if the cocaine had been excluded from evidence as a result of a successful motion to suppress, the trial court would have had a reasonable doubt about Petitioner's guilt because the cocaine was the only evidence of the charge against Petitioner. Accordingly, the Court concludes that defense counsel's failure to file a motion to suppress constituted deficient performance and that the deficient performance prejudiced Petitioner. Additionally, the state court's adjudication of Petitioner's claim was offensive to Supreme Court precedent, devoid of support from the record, and so arbitrary as to be outside the universe of plausible, credible outcomes. *Prelesnik*, 181 F.3d at 753. Thus,

Petitioner is entitled to relief.[10]

V. The Double Jeopardy Claim

Petitioner's second and final claim is that the trial court's initial decision to find him guilty of possessing less than 50 grams of cocaine constituted an acquittal of the charged offense (possession of 50 to 225 grams of cocaine). Therefore, argues Petitioner, his subsequent conviction of the charged offense violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

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[10]Petitioner's stipulation in this case and his guilty plea in an unrelated case on November 29, 1990, might lead one to conclude that Petitioner waived his ineffective-assistance-of-counsel claim. *See United States v. Broce*, 448 U.S. 56., 569 (1989) (stating that a voluntary and counseled guilty plea forecloses collateral attack on a conviction). During the proceeding on November 29, 1990, Petitioner pleaded guilty to charges of obstruction of justice and felony firearm in an unrelated case. In return, Petitioner was promised a sentence of probation for the obstruction-of-justice charge and dismissal of the felony firearm charge.

Petitioner also apparently intended to stipulate in this case that knowledge of the amount of cocaine in the bag was not an element of the offense and that the bag contained between 50 and 225 grams of cocaine. The trial court questioned Petitioner during the proceeding in such a way that Petitioner admitted knowing that he had possessed 50 to 225 grams of cocaine in this case. *See* WT III at 12-13. At sentencing, Petitioner maintained his innocence, and defense counsel argued that Petitioner had merely stipulated on November 29, 1990, that there were 50 to 225 grams of cocaine in the bag. *See* WT IV at 7-9.

Respondent characterizes the stipulation as an agreement that knowledge of the amount of cocaine in question was not an essential element of the charge. *See* Respondent's brief at 2. The Court concludes that Petitioner's stipulation on November 29, 1990, did not constitute a guilty plea to the charged offense in this case, nor a waiver of Petitioner's ineffective-assistance-of-counsel claim.

The Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the offence to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend. V. The Clause is applicable to the states through the Fourteenth Amendment. *Herbert*, 160 F.3d at 1136 (citing *Benton v. Maryland*, 395 U.S. 784, 794-95 (1969)). It "has been interpreted as protecting criminal defendants from successive prosecutions for the same offense after acquittal or conviction, as well as from multiple punishments for the same offense." *Rashad v. Burt*, 108 F.3d 677, 679 (6th Cir. 1997), *cert. denied*, __U.S._ , 118 S. Ct. 850 (1998).

"[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action. Rather, [a reviewing court] must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Company*, 430 U.S. 564, 571 (1977)(citations and footnote omitted).

In this case,

> the trial court concluded from the testimony that although defendant knew the carryall bag contained cocaine, the prosecution had not proved that defendant knew how much cocaine was in the bag, and defendant therefore was guilty only of simple possession. The

> court then announced that it was finding defendant guilty of possessing less than fifty grams.
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> The prosecutor then moved for reconsideration. The prosecutor argued that quantity was not an element of the crime and asked that the court not render its verdict until such time as the prosecution had an opportunity to appeal the court's finding. The court agreed to the prosecutor's request and took the matter under advisement.
>
> A month later the parties entered into a stipulation that enabled the trial court to find defendant guilty of possession of 50 to 225 grams of cocaine on the basis of an admission by defendant that he had been aware that he was carrying between 50 and 225 grams of cocaine. Defendant was then sentenced.

Northrop, 213 Mich. App. At 496.

The Michigan Court of Appeals analyzed Petitioner's claim as follows:

> The Constitutions of the United States and the State of Michigan prohibit placing a defendant twice in jeopardy for a single offense. U.S. Const., Am. V; Const. 1963, art. 1, § 15; *People v. Wilcox*, 183 Mich. App. 616, 620, 456 N.W. 2d 421 (1990), lv. Den.[,] 437 Mich. 1002, 472 N.W. 2d 636 (1991), cert. den.[,] 502 U.S. 898, 112 S. Ct. 274, 116 L. Ed. 2d 226 (1991). The purpose of the double jeopardy protection is to preserve the finality of judgments in criminal prosecutions and protect

> defendants from prosecutorial overreaching. *People v Sturgis*, 427 Mich. 392, 398-399, 397 N.W. 2d 783 (1986).
>
> A review of the record convinces this Court that the trial court did not render a verdict but was articulating its findings with respect to the elements of the charge and that both counsel for the defendant and the people were proceeding with full understanding that the trial court did not render a verdict. *People v. Anderson*, 409 Mich. 474, 482-483, 295 N.W. 2d 482 (1980).

Id. at 496-97.

This Court agrees that the trial court did not enter a final verdict of acquittal on the charged offense when it stated that it was finding Petitioner guilty of possessing less than 50 grams of cocaine. The trial judge's subsequent comments and the parties' conduct demonstrates that no one believed that the preliminary ruling in Petitioner's favor was actually a judgment of acquittal. *See* WT II at 123-35. The fact that Petitioner subsequently returned to the trial court and entered a stipulation on the disputed issue further demonstrates that the controversy had not been resolved earlier. *See* WT III. Defense counsel even stipulated at the Ginther hearing that the trial court had stayed the case. *See* GH V at 37. As such, the state court's decision on Petitioner's second claim was not contrary to, nor an unreasonable application of, federal

decisions interpreting the Double Jeopardy Clause. Accordingly, Petitioner's second claim lacks merit.

VI. Conclusion

Although Petitioner's double jeopardy claim lacks merits, the state court's decision on Petitioner's ineffective-assistance-of-counsel claim was contrary to, or an unreasonable application of, Supreme Court precedent. Accordingly, the Court **GRANTS** Petitioner's Habeas Corpus Petition on his claim that trial counsel should have filed a motion to suppress the only evidence against Petitioner. The State shall release Petitioner unless it retries him within sixty (60) days.

IT IS SO ORDERED.

HON. VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

dated:

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CHARLES NORTHROP,
a/ka CHARLES GLOVER,
Petitioner,

CASE NO. 98-CV-10133-BC
vs. HONORABLE VICTORIA A. ROBERTS

DAVID TRIPPETT,
Respondent.
_____ /

JUDGMENT

The above-entitled matter having come before the Court on a Petition for the Writ of Habeas Corpus, Honorable VICTORIA A. ROBERTS, United States District Judge, presiding, and in accordance with the Opinion and Order entered on_____, IT IS ORDERED that the Petition for a Writ of Habeas Corpus is GRANTED.

Dated at Bay City, Michigan on_____.

DAVID J. WEAVER
CLERK OF THE COURT
BY:_____
DEPUTY CLERK

APPROVED:

_____
VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

APPENDIX D

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES NORTHROP, a/k/a CHARLES GLOVER,

Defendant-Appellant.

SC: 104865

COA: 144218

LC: 90-009964

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Levin, J., states as follows:

I would grant leave to appeal to consider the claim of ineffective assistance of counsel.

I

The police received a tip that two black men were selling drugs in front of Detroit's Greyhound station. One was identified as wearing a green denim outfit; no description was given of the other man. When police arrived they saw defendant sitting next to a man dressed in green. The men were inside the terminal (the tip said they were in front) and no suspicious activity was going on. The officers approached the defendant and the man in green, who had both gotten up and were attempting to walk past the officers. The police asked t speak to each of the men. As defendant got up to walk over to the officer, he put a brown carry-on bag he had been carrying underneath his seat.

The officers questioned the men separately, with

defendant admitting being with the man in green while the man in green claimed to alone. The officers took the men out to the front of the bus depot and asked each separately if he was buying or selling or doing anything with drugs. The defendant denied selling cocaine but admitted to having a marijuana "bud" in his sock. He was arrested, and the officer searched tghe brown carry-on bag, finding approximately 124 grams of cocaine in the bag.

The defendant moved in the Court of Appeals for a remand for a *Ginther*[1] hearing, arguing that his trial counsel should have filed a motion to suppress. The remand was granted, but the judge found counsel was not ineffective. The Court of Appeals affirmed.

II

The defendant contends that his counsel was ineffective in failing to file a motion to suppress. Defendant contends that the initial questioning was not based on reasonable suspicion. The police had an unconfirmed anonymous tip about drug selling at the bus station, but did not observe selling when they arrived. The police did not undertake surveillance for conduct in conformity with a profile or otherwise check to determine if the defendant, or the man in green, was doing anything consistent with drug selling. Defendant also contends that the officers' admission that defendant was not free to leave while they were "investigating" requires a finding of custodial interrogation. He further contends that a reasonable person would not have felt free to leave after the officers asked him for identification and required him to empty his pockets when he said he had

[1]*People v. Ginther*, 390 Mich 436 (1973).

none on him. Without *Miranda*[2] warnings, his confession to possessing a marijuana "bud" was illegally obtained and the search of the bag was fruit of the poisonous tree.

Finally the defendant contends that the search of the bag was not a valid search incident to arrest. The defendant was out of reach of the bag at the time of the arrest for marijuana possession, and the officers could not have feared he would grab a weapon out of the bag or destroy any evidence in it. The bag was not within his reach or immediate control, as required by *Chimel v California*, 395 US 752 (1969). The officers retrieved the bag and brought it within defendant's reach; this was improper circumvention of search-incident doctrine.

Cavanagh, J., concurs in the statement of Levin, J.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

_____, 19__ _____

Clerk

[2]*Miranda v Arizona*, 384 US 436 (1966).